SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 88

EDGAR B. SIMS, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 7, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appendix to Brief of Appellant

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 1794

UNITED STATES OF AMERICA, Plaintiff,

v.

EDGAR B. SIMS, Individually and State Auditor of the State of West Virginia, Defendant.

COMPLAINT

Now comes the United States of America, by Duncan W. Daugherty, United States Attorney in and for the Southern District of West Virginia, and for its claim against the above-named defendant, alleges as follows:

I

The plaintiff is a corporation sovereign and body politic.

II

This action is brought under the direction of the Attorney General of the United States at the request of the Commissioner of Internal Revenue and pursuant to the provisions of the Internal Revenue Code of 1954, Sections 7401, 6331 and 6332.

[fol. 2]

III

The defendant, Edgar B. Sims, during all times hereinafter mentioned was and now is the qualified and acting State Auditor of the State of West Virginia.

IV

The defendant, Edgar B. Sims, resides in the Southern Judicial District of West Virginia.

V

Henry Hart, is and was at all times hereinafter mentioned indebted to the plaintiff due to income tax deficiencies for the years 1946, 1950 and 1951.

The Commissioner of Internal Revenue made an assessment of these tax deficiencies. The assessment list was received by the then Collector of Internal Revenue at Parkersburg, West Virginia, on or about April 3, 1953 who demanded payment of said assessment from Henry Hart. Nevertheless, no part of this tax deficiency has been paid at the time of filing this complaint.

Said tax deficiency remained unpaid for more than ten days after demand for payment had been made and said ten day period had elapsed prior to the serving of the notices of levy on the defendant, Edgar B. Sims, as hereinafter set forth.

VI

Alvin B. and Alma Alexander, are and were at all times hereinafter mentioned indebted to the plaintiff due to income tax deficiencies for the year 1953. The Commissioner of Internal Revenue made an assessment of this tax de-
[fol. 3] ficiency. The assessment list was received by the then Collector of Internal Revenue at Parkersburg, West Virginia, on or about May 20, 1954; who demanded payment of said assessment from Alvin S. and Alma Alexander. No part of this tax deficiency has been paid at the time of filing this complaint.

This tax deficiency remained unpaid for more than ten days after said demand for payment had been made and said ten day period had elapsed prior to the serving of the notices of levy on the defendant, Edgar B. Sims, as hereinafter set forth.

VII

Kathleen Wheeler, is and was at all times hereinafter mentioned indebted to the plaintiff due to income tax deficiencies for the year 1953. The Commissioner of Internal Revenue made an assessment of this tax deficiency and the assessment list was received by the Collector of Internal Revenue at Parkersburg, West Virginia on or about April 1, 1954, who demanded payment of said assessment from Kathleen Wheeler. No part of this tax deficiency has been paid at the time of filing this complaint.

This tax deficiency remained unpaid for more than ten days after said demand for payment had been made. Said ten day period had elapsed prior to the serving of the notices of levy on the defendant, Edgar B. Sims, as hereinafter set forth.

VIII

Elbert M. Henderson, Sr., is and was at all times hereinafter mentioned indebted to the plaintiff due to income tax [fol. 4] deficiencies for the years 1952 and 1953. The Commissioner of Internal Revenue made an assessment of these tax deficiencies. The assessment list for the 1952 deficiency was received by the Collector of Internal Revenue at Parkersburg, West Virginia, on or about April 2, 1953, and the assessment list for the 1953 deficiency was received by said Collector on or about April 15, 1954, who demanded payment of said assessments from Elbert M. Henderson, Sr. No part of this tax deficiency has been paid at the time of filing this complaint.

This tax deficiency remained unpaid for more than ten days after said demands for payment had been made. Said ten day periods had elapsed prior to the serving of the notices of levy on the defendant, Edgar B. Sims, as hereinafter set forth.

IX

Willie R. Childers, is and was at all times hereinafter mentioned indebted to the plaintiff due to income tax deficiencies for the years 1952, 1953 and 1954. The Commissioner of Internal Revenue made assessments of these tax deficiencies. The assessment list for the 1952 deficiency was

received by the Collector of Internal Revenue at Parkersburg, West Virginia, on or shortly after March 23, 1953, and the assessment list for the 1953 deficiency was received by said Collector on or shortly after April 15, 1954, who demanded payment of said assessment from Willie R. Childers. The assessment for the 1954 deficiency was made on May 11, 1955; the Collector of Internal Revenue at Parkersburg, West Virginia demanded payment of this assessment from Willie R. Childers. No part of these tax defi- [fol. 5] ciencies has been paid at the time of filing this complaint.

These tax deficiencies remained unpaid for more than ten days after said demands for payment had been made. Said ten day period had elapsed prior to the serving of the notices of levy on the defendant, Edgar B. Sims, as hereinafter set forth.

X

Said Henry Hart, Alvin S. and Alma Alexander, Kathleen Wheeler and Elbert M. Henderson, Sr., were employed by the State of West Virginia and had accrued wages due and owing at the time notices of levy were made these wages as hereinafter set forth.

XI

On April 20, 1953, Notice of Federal tax liens upon all property and rights to property of said Henry Hart, was filed with the Clerk of the Court, Kanawha County, Charleston, West Virginia.

XII

On August 17, 1955, Notices of Federal tax liens upon all property and rights to property of said Alvin S. and Alma Alexander, were filed with the Clerk of the Court, Kanawha County, Charleston, West Virginia.

XIII

On October 27, 1955, Notices of Federal tax liens upon all property and rights to property of said Kathleen Wheeler and Elbert M. Henderson, Sr., were filed with the Clerk of

[fol. 6] the Court, Kanawha County, Charleston, West Virginia.

XIV

On February 3, 1956, Notices of Federal tax liens upon all property and rights to property of said Willie R. Childers, was filed with the Clerk of the Cabell County Court, Huntington, West Virginia.

XV

On December 14, 1955, notice of levy upon the accrued wages of said Henry Hart in the amount of $1,562.61, and demand for payment was served upon the defendant, Edgar B. Sims, pursuant to Section 6331(a), Internal Revenue Code of 1954.

XVI

On October 27, 1955, notice of levy upon the accrued wages of said Alvin S. and Alma Alexander, in the amount of $228.64 and demand for payment was served upon the defendant, Edgar B. Sims, pursuant to Section 6331(a), Internal Revenue Code of 1954.

XVII

On October 27, 1955, notice of levy upon the accrued wages of said Kathleen Wheeler in the amount of $84.56 and demand for payment was served upon the defendant, Edgar B. Sims, pursuant to Section 6331(a), Internal Revenue Code of 1954.

XVIII

On October 27, 1955, notice of levy upon the accrued wages of said Elbert M. Henderson, Sr., in the amount of [fol. 7] $308.50 and demand for payment was served upon the defendant, Edgar B. Sims, pursuant to Section 6331(a), Internal Revenue Code of 1954.

XIX

On January 18, 1956, notice of levy upon the accrued wages of said Willie R. Childers, in the amount of $337.90

and demand for payment were served upon the defendant, Edgar B. Sims, pursuant to Section 6331(a), Internal Revenue Code of 1954.

XX

At the time notices of levy and demands for payment were served upon Edgar B. Sims, as set out in paragraphs XV, XVI, XVII, XVIII and XIX, said defendant Edgar B. Sims, as State Auditor of the State of West Virginia was indebted and obligated to the persons upon whose wages said levies were made, to pay them their wages which had accrued at that time.

XXI

On December 16, 1955, pursuant to Section 6332(a), Internal Revenue Code of 1954, final demands were made upon the defendant, Edgar B. Sims, to surrender to the District Director of Internal Revenue, Parkersburg, West Virginia, accrued wages which were subject to the levy as set out in paragraph XV of this complaint.

XXII

On November 7, 1955, pursuant to Section 6332(a), Internal Revenue Code of 1954, final demand was made upon the defendant to surrender to the District Director of In-
[fol. 8] ternal Revenue, Parkersburg, West Virginia, accrued wages which were subject to the levies set out in paragraphs XVI, XVII, and XVIII of this complaint.

XXIII

On March 7, 1956, pursuant to Section 6332(a), Internal Revenue Code of 1954, final demand was made upon the defendant to surrender to the District Director of Internal Revenue, Parkersburg, West Virginia, accrued wages which were subject to the levy as set out in paragraph XIX of this complaint.

XXIV

Nevertheless, the defendant has at all times refused to surrender said accrued wages to the District Director, Par-

kersburg, West Virginia, and at the present time these levies remain completely unsatisfied.

XXV

Wherefore, plaintiff prays:

1. That the defendant, Edgar B. Sims, as Auditor of the State of West Virginia, be required to submit to this Court an accounting of all wages which he has paid, has been obligated to pay, or is presently obligated to pay, to Henry Hart, which had accrued as of December 14, 1955, which is the date that notice of levy upon the wages of that taxpayer was served on said Edgar B. Sims, and further, that the defendant also be required to submit to this court an accounting of all wages which he has paid, has been obligated to pay, or is presently obligated to pay to Alvin S. Alexander and Alma Alexander, Kathleen Wheeler and Elbert [fol. 9] M. Henderson, Sr., which had accrued as of October 27, 1955, which is the date that notice of levy upon the wages of these taxpayers was served on the defendant, and further, that the defendant also be required to submit to this court an accounting of all wages which he has paid, has been obligated to pay, or is presently obligated to pay to said Willie R. Childers, which had accrued as of January 18, 1956, which is the date that notice of levy upon the wages of this taxpayer was served upon the defendant.

2. That this Court adjudge and decree that the plaintiff had during all times since April 3, 1953, valid and subsisting liens for the tax deficiencies of said Henry Hart, plus penalties and interest, upon all property and property rights of the defendant, Henry Hart and specifically upon the accrued wages in the possession of the defendant, Edgar B. Sims.

3. That this Court adjudge and decree that the plaintiff had during all times since May 20, 1954, valid and subsisting liens for tax deficiencies, of said Alvin S. and Alma Alexander, plus penalties and interest, upon all property and property rights of the defendants, Alvin S. and Alma Alexander and specifically upon accrued wages in the possession of the defendant, Edgar B. Sims.

4. That this Court adjudge and decree that the plaintiff had during all times since April 1, 1954, valid and subsisting liens for tax deficiencies, of said Kathleen Wheeler, plus penalties and interest, upon all property and property rights of the defendant, Kathleen Wheeler and specifically upon accrued wages in the possession of the defendant, Edgar B. Sims.

[fol. 10] 5. That this Court adjudge and decree that the plaintiff had during all times since April 2, 1953, valid and subsisting liens for the tax deficiencies, of said Elbert M. Henderson, Sr., for the year 1952, plus penalties and interest, and that this Court adjudge and decree that the plaintiff had during all times since April 12, 1954 valid and subsisting liens for tax deficiency of said Elbert M. Henderson, Sr., for the year 1953 plus penalties and interest, upon all property and property rights of said, Elbert M. Henderson, Sr., and specifically upon accrued wages in the possession of the defendant, Edgar B. Sims.

6. That this Court adjudge and decree that the plaintiff had during all times since March 23, 1953 or shortly thereafter, valid and subsisting liens for the tax deficiencies of said Willie R. Childers for the year 1952, plus penalties and interest, and that this Court adjudge and decree that the plaintiff had during all times since April 15, 1954 or shortly thereafter, valid and subsisting liens for the tax deficiency of said Willie R. Childers, for the year 1953, plus penalties and interest, and that this Court adjudge and decree that the plaintiff had during all times since May 11, 1955, valid and subsisting liens for the tax deficiency of said Willie R. Childers, for the year 1954, plus penalties and interest, upon all property and property rights of said Willie R. Childers, and specifically upon accrued wages in the possession of the defendant Edgar B. Sims.

7. That, pursuant to Section 6332(b), Internal Revenue Code of 1954, it have judgment against the defendant, Edgar B. Sims, in an amount equal to the amount of wages due and owing to said Henry Hart as of December 14, 1955, plus interest as provided by law. However, such recovery [fol. 11] shall not be in excess of $1,562.61 which is the

amount of taxes for which levy on that taxpayers wages was made, plus interest as provided by law.

8. That, pursuant to Section 6332(b), Internal Revenue Code of 1954, it have judgment against the defendant, Edgar B. Sims, in an amount equal to the amount of wages due and owing to said Alvin S. Alexander or Alma Alexander, as of October 27, 1955, plus interest as provided for by law. However, such recovery shall not be in excess of $228.64 which is the amount of taxes for which levy upon that taxpayers wages was made, plus interest as provided for by law.

9. That pursuant to Section 6332(b), Internal Revenue Code of 1954, it have judgment against the defendant, Edgar B. Sims, in an amount equal to the amount of wages due and owing to said Kathleen Wheeler, as of October 27, 1955, plus interest as provided for by law. However, such recovery shall not be in excess of $84.56 which is the amount of taxes for which levy on that taxpayers wages was made, plus interest as provided for by law.

10. That pursuant to Section 6332(b), Internal Revenue Code of 1954, it have judgment against the defendant, Edgar B. Sims, in an amount equal to the amount of wages due and owing to said Elbert M. Henderson, Sr., as of October 27, 1955, plus interest as provided for by law. However, such recovery shall not be in excess of $308.50 which is the amount of taxes for which levy on that taxpayers wages was made, plus interest as provided for by law.

[fol. 12] 11. That pursuant to Section 6332(b), Internal Revenue Code of 1954, it have judgment against the defendant, Edgar B. Sims, in an amount equal to the amount of wages due and owing to said Willie R. Childers, as of January 18, 1956, plus interest as provided for by law. However, such recovery shall not be in excess of $337.90, which is the amount of taxes for which levy on that taxpayer's wages was made, plus interest as provided for by law.

12. That the plaintiff be awarded the cost of this action.

13. That the plaintiff have such other and further relief as to the Court may seem proper.

Percy H. Brown, Asst. United States Attorney.

[fol. 13]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

DEFENDANT'S MOTION TO DISMISS

The defendant moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

2. To dismiss the action or, in lieu thereof, to quash the return of service of summons, on the grounds (a) that the defendant, in performing the acts complained of, was acting only in his official capacity as an officer or agent of the state, and (b) that such action against him is an action against the State of West Virginia which is prohibited by the provisions of Article VI, Section 35, of the West Virginia Constitution, and the Eleventh Amendment to the United States Constitution.

[fol. 14] 3. To dismiss the action for the reason that Sections 6331 and 6332 of the Internal Revenue Code of 1954 do not authorize the direction of the levy contemplated therein against a state or an officer thereof.

4. To dismiss the action because the defendant, as Auditor of the State of West Virginia, is not a person in possession of or obligated with respect to property or rights to property subject to levy, as contemplated by Section 6332 of the Internal Revenue Code of 1954.

5. To dismiss the action because (a) the defendant is not an employer for whom the taxpayer performs a service, and (b) he does not have control of the payment for services rendered in the State of West Virginia or any agency thereof.

6. To dismiss the action on the ground of the failure to join indispensable parties, in that the plaintiff failed to join, as parties defendant, the five taxpayers, some-

times referred to in said complaint as defendants, the head of the spending unit for whom the taxpayer performs services, the director of the budget and the state treasurer.

John G. Fox, Attorney General for the State of West Virginia, State Capitol, Charleston, West Virginia; Fred H. Caplan, Assistant Attorney General for the State of West Virginia, State Capitol, Charleston, West Virginia, Counsel for Defendant.

[fol. 15]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action File No. 1794

UNITED STATES OF AMERICA, Plaintiff,

vs.

EDGAR B. SIMS, Individually and State Auditor of the State of West Virginia, Defendant.

ORDER ON MOTION TO DISMISS—September 10, 1957

This cause came on for hearing upon defendant's motion to dismiss, whereupon arguments were presented and briefs were filed by counsel for plaintiff and defendant. After careful consideration of the matters so presented, this court, by letter dated October 15, 1956, informed respective counsel that defendant's motion to dismiss was overruled insofar as it related to the defendant in his individual capacity, but that the motion must be granted, insofar as it related to the defendant as Auditor of the State of West Virginia. In accordance with the rulings contained in the aforementioned letter, it is hereby Ordered and Decreed that defendant's said motion to dismiss be overruled as to the defendant in his individual capacity, but that said motion be granted insofar as it relates to the defendant as Auditor of the State of West Virginia.

[fol. 16] This Order, having been inadvertently omitted subsequent to the court's ruling on said motion to dismiss, is hereby entered nunc pro tunc.

Entered: 10th day of September, 1957.

/s/ Ben Moore, Judge.

Approved as to form:

/s/ Fred H. Caplan, Assistant Attorney General, State of West Virginia.

/s/ Percy H. Brown, Assistant United States Attorney.

[fol. 17]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

ANSWER OF DEFENDANT EDGAR B. SIMS

I

Defendant, Edgar B. Sims, admits the allegation contained in paragraphs I, III, IV, and X of the complaint.

II

Defendant, Edgar B. Sims, is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs II, V, VI, VII, VIII, IX, XI, XII, XIII, and XIV of the complaint.

III

Defendant, Edgar B. Sims, admits the allegations contained in paragraphs XV, XVI, XVII, and XVIII of the complaint, except that he denies that such levy was served upon him in his individual capacity, but rather was served upon him as Auditor of the State and was directed to [fol. 18] the State of West Virginia, as the person holding property, moneys, etc., belonging to the taxpayer.

IV

Defendant, Edgar B. Sims, admits the allegations of paragraph XIX of the complaint, except that he denies that such levy was served upon him in his individual capacity, but rather was served upon him as Auditor of the State and was directed to him in his capacity as State Auditor of the State of West Virginia, as the person holding property, moneys, etc., belonging to the taxpayer.

V

Defendant, Edgar B. Sims, denies the allegations contained in paragraphs XX, XXI, XXII, and XXIII of the complaint.

VI

Defendant, Edgar B. Sims, admits the allegations contained in paragraph XXIV of the complaint, except that he denies that, in his individual capacity, he had any right or duty to surrender said accrued wages.

First Defense

The complaint fails to state a claim against the defendant, Edgar B. Sims, individually, upon which relief can be granted.

Second Defense

The defendant, in his individual capacity, had neither the authority nor the duty to surrender the accrued wages [fol. 19] of the taxpayers, as demanded in the complaint.

Third Defense

The defendant, Edgar B. Sims, in his individual capacity, is not a person in possession of or obligated with respect to property or rights to property subject to levy, as contemplated by Section 6332 of the Internal Revenue Code of 1954.

Fourth Defense

The defendant, in his individual capacity, is not an employer for whom the taxpayer performs a service.

Fifth Defense

The complaint fails to allege that the defendant, Edgar B. Sims, individually, was indebted and obligated to the persons, upon whose wages said levies were made, to pay them their wages which had accrued at that time.

John G. Fox, Attorney General for the State of West Virginia, State Capitol, Charleston, West Virginia; Fred H. Caplan, Assistant Attorney General, State Capitol, Charleston, West Virginia, Counsel for Defendant.

[fol. 20]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

[Title omitted]

STIPULATION OF FACTS

The parties to the above case, through their respective attorneys, agree that for the purposes of this action the following facts may be taken as true, subject, however, to the right of either party to present such further oral or written evidence as is not inconsistent herewith.

1. This action was brought under the direction of the Attorney General of the United States at the request and authorization of the Commissioner of Internal Revenue.

2. Henry Hart, is and was at all times hereinafter mentioned indebted to the plaintiff for income tax deficiencies for the years 1946, 1950 and 1951 in the total amount of $1,562.61, including statutory additions as of December 5, 1955.

[fol. 21] The Commissioner of Internal Revenue made an assessment of these tax deficiencies. The assessment list was received by the then Director of Internal Revenue at Parkersburg, West Virginia on or about April 3, 1953, who demanded payment of said assessed deficiencies from Henry Hart. Nevertheless, no part of this tax deficiency has been paid at the time of filing this complaint.

Said tax deficiency remained unpaid for more than ten days after demand for payment had been made and said ten-day period had elapsed prior to the serving of the notices of levy on the defendant, Edgar B. Sims, Auditor, State of West Virginia. Said notice of levy in the amount of $1,562.61, including statutory additions, was served on the defendant on December 14, 1955.

3. Alvin S. and Alma Alexander, are and were at all times hereinafter mentioned indebted to the plaintiff for income tax deficiencies for the year 1953 in the amount of $228.64, including statutory additions as of October 27, 1955.

The Commissioner of Internal Revenue made an assessment of this tax deficiency. The assessment list was received by the then Collector of Internal Revenue at Parkersburg, West Virginia, on or about May 20, 1954, who demanded payment of said assessed deficiencies from Alvin S. and Alma Alexander. No part of this tax deficiency has been paid at the time of filing this complaint.

This tax deficiency remained unpaid for more than ten days after said demand for payment had been made and said ten-day period had elapsed prior to the serving of [fol. 22] the notices of levy on the defendant, Edgar B. Sims, Auditor, State of West Virginia. Said notice of levy, in the amount of $228.64, including statutory additions, was served on the defendant on October 27, 1955.

4. Kathleen Wheeler, is and was at all times hereinafter mentioned indebted to the plaintiff for income tax deficiencies for the year 1953 in the amount of $84.56, including statutory additions as of October 27, 1955.

The Commissioner of Internal Revenue made an assessment of this tax deficiency and the assessment list was received by the then Collector of Internal Revenue at Parkersburg, West Virginia, on or about April 1, 1954, who demanded payment of said assessed deficiencies from Kathleen Wheeler. No part of this tax deficiency has been paid at the time of filing this complaint.

This tax deficiency remained unpaid for more than ten days after said demand for payment had been made and said ten-day period had elapsed prior to the serving of

the notices of levy on the defendant, Edgar B. Sims, Auditor, State of West Virginia. Said notice of levy in the amount of $84.56, including statutory additions, was served on the defendant on October 27, 1955.

5. For the period December 1, 1955 through December 16, 1955, said Henry Hart received a "take home pay" of $117.00 which was paid by a warrant numbered 44693, issued by the defendant, Edgar B. Sims, State Auditor, State of West Virginia.

[fol. 23] 6. As of December 14, 1955 said Henry Hart had accrued a "take home pay" of $93.60.

7. For the period October 1, 1955 through October 31, 1955, Kathleen Wheeler received a "take home pay" of $178.00, which was paid by a warrant numbered 988857 issued by the defendant, Edgar B. Sims, State Auditor, State of West Virginia.

8. As of October 27, 1955 said Kathleen Wheeler had accrued a "take home pay" of $160.68.

9. For the period October 1, 1955 through October 31, 1955, said Alvin S. Alexander received a "take home pay" of $293.50 which was paid by a warrant numbered 990280 issued by the defendant, Edgar B. Sims, Auditor, State of West Virginia.

10. As of October 27, 1955 said Alvin S. Alexander had accrued a "take home pay" of $265.43.

11. On December 16, 1955, final demand was made upon the defendant, Edgar B. Sims, Auditor, State of West Virginia, to surrender to the District Director of Internal Revenue, Parkersburg, West Virginia, any wages of said Henry Hart which were subject to the aforementioned levy.

12. On November 7, 1955, final demand was made upon the defendant, Edgar B. Sims, Auditor, State of West Virginia, to surrender to the District Director of Internal Revenue, Parkersburg, West Virginia, any wages of said Kathleen Wheeler which were subject to the aforementioned levy.

[fol. 24] 13. On November 7, 1955, final demand was made upon the defendant, Edgar B. Sims, Auditor, State of West Virginia, to surrender to the District Director of Internal Revenue, Parkersburg, West Virginia, any wages of said Alvin S. Alexander which were subject to the aforementioned levy.

14. The parties have intentionally omitted from this stipulation any reference to levies made upon the wages of Elbert M. Henderson or Willie R. Childers, as the defendant is presently unable to locate the relevant records of these persons' wage payments. Therefore, in order to save the court and parties the time and inconvenience of lengthy proof, the plaintiff is presently willing to have any possible liability for not honoring the levies upon the wages of these persons omitted from any judgment it may receive in this case.

However, it is agreed that should the defendant locate these records he will so inform the plaintiff and this stipulation will be amended accordingly.

/s/ Fred H. Caplan, Assistant Attorney General, State of West Virginia.

/s/ Percy H. Brown, Assistant United States Attorney.

[fol. 25]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

Civil Action No. 1794

UNITED STATES OF AMERICA, Plaintiff,

vs.

EDGAR B. SIMS, Individually and State Auditor of the State of West Virginia, Defendant.

JUDGMENT ORDER—July 24, 1957

This cause came on to be heard before the Court sitting without a jury on May 23, 1957. The facts were fully stipulated and after briefs and oral arguments being submitted by the parties, the Court concludes as a matter of law that the plaintiff is entitled to a judgment against this defendant. It is hereby Ordered and Decreed that the plaintiff have judgment against the defendant, Edgar B. Sims, in the amount of Five Hundred Nineteen Dollars and Seventy-one Cents ($519.71) plus interest as provided for by law.

[fol. 26] Dated this 24th day of July, 1957.

/s/ Ben Moore, Honorable Judge Ben Moore.

Approved as to form:

/s/ Fred H. Caplan, Assistant Attorney General, State of West Virginia.

/s/ Percy H. Brown, Assistant United States Attorney.

[fol. 27]

IN UNITED STATES DISTRICT COURT

NOTICE OF LEVY

Form 668-A
Rev. Jan. 1955

U. S. Treasury Department — Internal Revenue Service
Notice of Levy

To: (Name of person holding property, moneys, etc., belonging to taxpayer)

State of West Virginia, West Virginia State Liquor Control Commission, 1715½ Washington St. E. Charleston, West Va.

You are hereby notified that there is now due, owing, and unpaid from

Name and Address of Taxpayer

Henry Hart
614½ Court Street, Charleston, West Virginia

to the United States of America the sum of

One Thousand Five Hundred Sixty-two and 61/100 Dollars $1,562.61

for Internal Revenue Taxes, to wit:

Period and Type of Tax	Date of Assessment	Account No.	Unpaid Balance	Statutory Additions	Total
1946 Income	4-1-53	4-1-53 SPL #1 02 P	$1,027.87	$201.01	$1,228.88
1950 Income	4-1-53	4-1-53 SPL #1 04 P	172.79	26.49	199.28
1951 Income	4-1-53	4-1-53 SPL #1 06 P	116.39	18.06	134.45
		Total Amount Due			$1,562.61

You are further notified that demand has been made upon the taxpayer for the amount set forth herein, and that such amount is still due, owing, and unpaid from this taxpayer, and that the lien provided for by Section 6321, Internal Revenue Code of 1954, now exists upon

all property or rights to property belonging to the aforesaid taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability.

Dated at Parkersburg, West Virginia this 5th day of December 1955

District Director of Internal Revenue
P. L. Charles

By (Signature)
/s/ T. T. Rhodes

Title
Group Supervisor

Certificate of Service

I hereby certify that this levy was served by handing a copy of this notice of levy to

Name and Title
Edgar B. Sims, Auditor, State of WVa

on 12/14, 1955 at a.m. p.m.

Collection Officer (Signature)
/s/ Ralph L. Wilson

[fol. 28]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Appendix to Brief of Appellee

APPENDIX A

Constitution of the United States:

Article I

* * * * * * *

Section 8. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

* * * * * * *

Article VI

* * * * * * *

Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * * * *

Internal Revenue Code of 1954:

Sec. 6331. Levy and Distraint.

(a) Authority of Secretary or Delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate

to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. [fol. 29] Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

* * * * * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 6331.)

Sec. 6332. Surrender of Property Subject to Levy.

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty for Violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property [fol. 30] or rights not so surrendered, but not ex-

ceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) Person Defined.—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

(26 U.S.C. 1952 ed., Supp. II, Sec. 6332.)

Sec. 6334. Property Exempt From Levy.

(a) Enumeration.—There shall be exempt from levy—

(1) Wearing Apparel and School Books.—Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) Fuel, Provisions, Furniture, and Personal Effects.—If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock and poultry of the taxpayer, as does not exceed $500 in value;

(3) Books and Tools of a Trade, Business, or Profession.—So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $250 in value.

• • • • • • •

[fol. 31] (c) No Other Property Exempt.—Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

(26 U.S.C. 1952 ed., Supp. II, Sec. 6334.)

Treasury Regulations Relating to Assessment, Collection, Abatement, Credit, and Refund of Taxes (1954):

Sec. 301.6331-1. Levy and Distraint—(a) Authority to levy—* * *

* * * * * * *

(4) Certain types of compensation—* * *

(ii) State and municipal employees.—Accrued salaries, wages, or other compensation of any officer, employee, or elected or appointed official of a State or Territory, or of any agency, instrumentality, or political subdivision thereof, are also subject to levy to enforce collection of any Federal tax.

* * * * * * *

Constitution of West Virginia:

Article I

§ 1. The State of West Virginia is, and shall remain, one of the United States of America. The Constitution of the United States of America, and the laws and treaties made in pursuance thereof, shall be the supreme law of the land.

* * * * * * *

Article VI

* * * * * * *

§ 35. The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision [fol. 32] thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee. (House Joint Resolution No. 3, Acts 1935, p. 662; 1935, c. 23, Ratified.)

1 West Virginia Code of 1955:

§ 1031(1). Deductions by State Auditor from Salaries of State Officials and Employees to Pay Taxes

and Purchase United States Government Bonds.—The auditor of the State of West Virginia is authorized to deduct and withhold sums from the salaries or other compensation of state officials and employees, to purchase United States government bonds and other United States government obligations, or to pay taxes as may be required by an act or acts of the congress of the United States of America.

* * * * * * *

§ 1041. Accounts of Expenditures; Signing of Checks and Warrants; Facsimile Signatures and Use of Mechanical and Electrical Devices; Forgery; Penalty.—* * * The auditor shall keep accounts of the particular heads of expenditures, and, when he issues his warrant on the treasurer, shall credit the treasurer's account therewith and charge the same under the particular head of expenditure to which it properly belongs, distinguishing especially the disbursements on account of the capital and the annual income of the school fund, as directed in section two (§ 1039) of this article in relation to receipts belonging to the said fund. * * *

[fol. 33] 2 West Virginia Code of 1955:

§ 3834(18). Service of Suggestee Execution.—An execution issued under this article against money due and owing or to become due and owing from the State, or a state agency which shall be payable on the warrant of the state auditor for the payment thereof directed to the judgment debtor must be served upon the state auditor at his office in Charleston. * * *

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Appendix B

Opinion of the District Court

The Court: I wish that there were some precedent for a construction of these statutes as they apply to a situation such as is before me here. I am sure that any precedent would be helpful, and if we had some decision which was binding on this court I would, of course, follow that decision; but having no precedent at all, then it is the duty of the court as I see it to do the best it can to interpret the statutes and apply them to the facts of the case.

While I am somewhat disturbed by the provisions of Section 6332(c) defining a person in that it does not mention officers or employees of a state, I think that there might be a valid argument that in not mentioning them they were intended to be excluded, but that would lead as I view it to a very illogical and unreasonable result.

As pointed out; while Section 6331 provides a method for levying on accrued salaries and wages of various federal employees and officials, there would be no way to collect any such levy if those departmental officials of the federal government were not held to be included as persons, then there is no reason why a departmental official of a state government should not also be included as a person.

[fol. 34] I think under the provisions of Section 6332(a), particularly the parenthetical phrase, that the state auditor was obligated with respect to the moneys which are due to employes in view of the fact that if an employe's wages were withheld and he felt that he had the right to payment of wages, his remedy would be by a writ of mandamus against the auditor, which would certainly not operate on the auditor in his capacity as an arm of the State of West Virginia and would necessarily operate upon him in his personal and individual capacity, and he would be required individually to comply with any order of the court that was made.

Now, being obligated with respect to that debt of the state and being, as I believe, included in the definition of person, I think that the law is clear that demand having been made on him for the payment of the money, and he having refused to pay it and having paid it over instead to the employe, and further in view of the statute which does give him authority to deduct and withhold sums from the salaries of state employes to pay taxes as may be required by act of Congress, that plaintiff here has established its clear right to the relief for which it asks.

I shall not attempt to state the amount because that can be gathered from the stipulation of facts, but the United States will be given a judgment against the defendant Edgar B. Sims individually for the amount of taxes as ascertained by the stipulation.

[fol. 35]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7525

EDGAR B. SIMS, Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston

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[fol. 36]

ARGUMENT AND SUBMISSION—November 21, 1957

(omitted in printing)

IN THE UNITED STATES COURT OF APPEALS

ORDER REQUESTING PARTIES TO FILE WITHIN THIRTY DAYS BRIEFS SETTING FORTH LEGISLATIVE HISTORY, ETC.—December 10, 1957

The parties are hereby requested to file within thirty (30) days briefs setting forth the legislative history of Secs. 6321, 6331, and 6332 of the 1954 Internal Revenue Code, particularly any data reflecting the intent to authorize the filing of liens and levying of distraint upon the accrued income of state employees; and further, any available information as to the administrative *practice* in this respect from the date of I.T. 2405 until it was revoked by Rev. Rul. 55-227.

Morris A. Soper, United States Circuit Judge.
Simon E. Sobeloff, United States Circuit Judge.
Clement F. Haynsworth, Jr., United States Circuit Judge.

[File endorsement omitted]

[fol. 37]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7525

EDGAR B. SIMS, Appellant,

versus

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston

---

OPINION—February 7, 1958

(Argued November 21, 1957.)

Before Soper, Sobeloff, and Haynsworth, Circuit Judges.

Fred H. Caplan, Assistant Attorney General of West Virginia, (W. W. Barron, Attorney General of West Virginia, on brief) for Appellant, and Mildred L. Seidman, Attorney, Department of Justice, (Charles K. Rice, Assistant Attorney General; Lee A. Jackson and Melva M. Graney, Attorneys, Department of Justice; Duncan W. Daugherty, United States Attorney, and Percy H. Brown, Assistant United States Attorney, on brief) for Appellee.

[fol. 38]

SOBELOFF, Circuit Judge:

The sole issue in this case is whether a state official who makes payment of accrued salaries to state employees in

disregard of a notice of levy by the Commissioner of Internal Revenue for taxes due the United States by such employees may be held personally liable.

Edgar B. Sims, State Auditor of West Virginia, appeals from a judgment of $519.71 entered against him individually in favor of the United States for refusing to surrender the accrued wages of three employees of the state after the District Director of Internal Revenue had served notices of levy upon him.

The three employees owed federal taxes upon earnings in endeavors apart from their state employment. The Commissioner of Internal Revenue made an assessment of tax deficiencies as to each and forwarded the assessments to the Director of Internal Revenue at Parkersburg, West Virginia, for collection. The Director demanded payment from each of them, and, the deficiencies remaining unpaid for more than ten days, he served on the State Auditor notices of levy upon their accrued salaries pursuant to Section 6331 of the 1954 Internal Revenue Code (26 U.S.C.A.).[1]

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[1] 26 U.S.C.A., Sec. 6331:

"(a) Authority of Secretary or delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

"(b) Seizure and sale of property.—The term 'levy' as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible)."

When the levies were made, the three employees had accrued "take home pay" totalling $519.71.
[fol. 39] On the advice of the office of the Attorney General of West Virginia, the appellant refused to honor the notices of levy; and issued to each of the employees a warrant for the payment of his salary.

Thereafter, the government brought this suit in the United States District Court for the Southern District of West Virginia against Sims pursuant to Section 6332 of the 1954 Internal Revenue Code, (26 U.S.C.A.),[2] to recover a sum equal to the value of the property not surrendered. As originally brought, the suit was against Sims individually and as Auditor of the State of West Virginia. The defendant filed a motion to dismiss the action, and the Court granted it insofar as it related to the defendant as [fol. 40] Auditor of West Virginia, but overruled it as to Sims in his individual capacity. On the stipulated facts, the court entered judgment against Sims in the amount of $519.71 plus interest, and this appeal followed.

In unambiguous terms, Section 6331 authorizes the collection of delinquent taxes "by levy upon all property and

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[2] 26 U.S.C.A., Sec. 6332:

"(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

"(b) Penalty for violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

"(c) Person defined.—The term 'person,' as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation."

rights to property" belonging to a delinquent taxpayer;[3] and it is not disputed that, in general, accrued wages are properly subject to levy. 9 MERTENS, TAXATION (1943), Sec. 49.165; *United States* v. *Long Island Drug Co.*, 115 F.2d 983, 986 (2 cir., 1940). See: 26 C.F.R. Sec. 301.6331-1 (a) (1); II-1 Cum. Bull., 172 (I. T. 1557) (1923).

In spite of the statute's broad language, the appellant contends that the accrued salaries of state employees must be treated differently. He relies heavily on the fact that in 1928 the Internal Revenue Service itself ruled that salaries of certain municipal officers were not subject to distraint [fol. 41] while in the hands of a city treasurer. VII-1, Cum. Bull., 72 (I.T. 2405) (1928).[4] Since this ruling was not expressly revoked until 1955 (1955-1 Cum. Bull., 551 (Rev. Rule 55-227), Sims contends that "there appears to have been congressional acquiescence in the longstanding interpretation."

Administrative interpretations are not absolute rules of law which must necessarily be followed in every instance,

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[3] However, subsection (a) of Section 6334 of the 1954 I.R.C. (26 U.S.C.A.) lists certain exemptions, including wearing apparel, school books, fuel, and provisions. Subsection (c) concludes that, "Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)."

[4] VII-1, Cum. Bull. 72 (I.T. 2405) (1928):

"The inquiry as to whether the collector may distrain upon the salaries of the officers and employees of the M Street Railway and the M Water Board while in the hands of the city treasurer is answered in the negative. In I. T. 1557 (C. B. II-1, 172) it was held that the *accrued* salary or wage of an employee subject to the call or order of such employee may be levied upon. Quite probably it would be within the power of Congress to authorize distraint upon salaries and wages paid by a State or municipality for services rendered in connection with the exercise of a non-governmental function. I. T. 1557, however, refers to salaries paid by private persons and corporations and is based upon the analogy of accrued wages to bank deposits, within the purview of section 3187, Revised Statutes, and not upon any specific provision of that section. It is not believed that the analogy should be extended to include salaries paid by a State or municipality operating public utilities, even though such activities are considered a proprietary rather than a governmental function."

but are only helpful guides to aid courts in their task of statutory construction. The extent to which a court will place reliance upon an administrative interpretation depends on the circumstances, including the general purpose of the act, the authoritative source of the regulation or ruling, the clarity of the statutory language, the consistency of administrative policy, and whether administrative interpretation was brought to the attention of the legislators when they re-enacted, modified, or refused to change the statute. Cf., e.g., *Helvering* v. *N. Y. Trust Co.*, 292 U.S. 455 (1934); *United States* v. *Leslie Salt Co.*, 350 U.S. 383 [fol. 42] (1955). See: Brown, "Regulations, Reenactment and the Revenue Acts," 54 Harv. L. Rev. 377 (1941).

Since departmental rulings not promulgated by the Secretary of the Treasury "do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary" (see the cautionary notice published as a preface to the Cumulative Bulletins), Mr. Justice (later Chief Justice) Stone referred to them as being "of little aid in interpreting a tax statute." *Biddle* v. *Commissioner*, 302 U.S. 573, 582 (1938). The first authoritative declaration was not made until 1955, shortly after the enactment of the Internal Revenue Code of 1954 (but before the levy in this case[5]), when a Treasury Regulation, 26 C.F.R. Sec. 301.6331-1 (a) (4) (ii), expressly declared that Section 6331 permitted levy on accrued salaries of state and municipal employees. That the Treasury Department was not committed to the 1928 ruling (I.T. 2405) is borne out by the fact that there was no uniform adherence to its principle, but rather that it was repeatedly, if not consistently, ignored. It is noted that as early as 1935, the Government sought to levy upon the accrued salary of an employee of Woodbury County, Iowa. See: *United States* v. *Brechtel*, 90 F.2d 516 (8 cir., 1937).[6] There

[5] The regulation went into effect on January 1, 1955. 1955-1 Cum. Bull., p. 195, Sec. 7851. Two of the notices of levy were served on Sims on October 27, 1955, and the third was served on December 14, 1955.

[6] The court held, on the authority of *Collector* v. *Day*, 11 Wall. 113 (1870), that the salary was not constitutionally subject to levy. See: *Helvering* v. *Gerhardt*, 304 U.S. 405 (1938); *Graves* v. *N.Y.*,

[fol. 43] are numerous other instances of levies on state employees' salaries.[7]

It does not appear that Congress was, at any time, cognizant of the 1928 ruling (I.T. 2405), and, for this additional reason, it cannot be said that it received legislative ratification. "Whenever congressional awareness of the administrative interpretation does not appear and seems unlikely, the basis for the re-enactment rule vanishes." - DAVIS, ADMINISTRATIVE LAW (1951), Ch. 5, Sec. 59, p. 208. Dean Griswold has said, ". . . the mere re-enactment of a statute following administrative construction should be given no weight whatever in determining the proper construction of the statute." Griswold, "A Summary of the Regulations Problem," 54 Harv. L. Rev. 398, 400 (1941). The evidence is to the contrary of the basic assumption of the re-enactment rule, for when the Chief of Staff of the Joint Committee on Internal Revenue Taxation inquired, in 1950, whether the statutes relating to levy were applicable to a state, the Acting Commissioner of Internal Revenue replied in a letter that "this office believes it has the authority to collect taxes from State employees and contractors who are delinquent as regards those taxes by service of notices of levy on State officials holding monies due to those delinquent taxpayers." Thus, if any Congressional ratification of administrative policy is to be found, it would appear that Congress ratified the practice of which it was specifically made aware rather than the earlier ruling of which there is no evidence that it had any knowledge.

[fol. 44] The appellant has suggested that the express provision in Section 6331 for levy upon the accrued salaries

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ex rel. O'Keefe, 306 U.S. 466, 486 (1939), explaining that the effect of *Helvering* v. *Gerhardt* is that *Collector* v. *Day* and the cases decided thereunder "are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities."

[7] E.g., the June 23, 1943, issue of the *Wall Street Journal* contains an article entitled, "U. S. Acts to Prevent Income Tax Evasion by N. Y. State Workers," relating that a notice of levy had been served upon New York officials and that the State Comptroller, on advice of the Attorney General of New York, honored it.

of employees of the federal government and the omission of reference to state employees indicate an intention on the part of the legislators to withhold authorization from the Commissioner of Internal Revenue with respect to the latter. The legislative history of Section 6331 does not reveal the existence of any such negative intention, however, and both the House and the Senate Committee Reports merely contain the statement that "The provisions as to levy on salaries of Government employees are the same as those applicable to any other delinquent taxpayer." H. Rep. No. 1337, 83rd Cong., 2nd Sess., S. Rep. No. 1622, 83rd Cong. 2nd Sess., 1954 U. S. Code Cong. and Admve. News, pp. 4556, 5225.

Another and more likely explanation is at hand for the specific reference in Section 6331 to levy upon federal employees' salaries and the failure to mention state employees. It lies in a problem peculiar to the federal government. In *Smith* v. *Jackson*, 246 U.S. 388, (1918), it was held that a federal disbursing officer has no right to set-off, against a federal employee's salary, for debts owing to the United States. Accordingly, the Comptroller General ruled that notices of levy are "attempts to set off the tax indebtedness due to the United States against moneys due from the United States to the debtor," and "the administrative official served with such notice would be without authority to withhold any portion of the current salary of such employee in satisfaction of the notices of levy and distraint." 26 Comp. Gen. 907, 912 (1947). Undoubtedly, Section 6331 was designed to alleviate this difficulty and to subject federal employees to the same collection procedures as are available against all other taxpayers, including employees of the state.

[fol. 45] It is noteworthy that a closely related collection remedy, the tax lien, has been held applicable to money in the hands of a state. Where the State of California owed rent to a delinquent taxpayer, it was held that the Government could establish a lien upon it, and that the state could properly be subjected to a suit to foreclose the lien. *United States* v. *Graham*, 96 F.Supp. 318 (S.D. Calif., 1951), aff'd. *sub. nom., State of California* v. *United States*, 195 F.2d 530 (9 cir., 1952), *cert. den.*, 344 U.S. 831. See also, *United*

States v. *Newhard*, 128 F.Supp. 805 (W.D. Pa., 1955), where the government successfully enforced a tax lien against the wages of a county employee. It would indeed be an incongruity for the lien and levy provisions to receive contrary interpretations, particularly as the language of Section 6321, which provides for "a lien in favor of the United States upon all property and rights to property" of a delinquent taxpayer, is almost identical with the language of Section 6331. Neither logic nor the language of the statute demands such a result.

There is no Constitutional requirement that the salaries of state employees shall be treated differently from the salaries of others. *Helvering* v. *Gerhardt*, 304 U.S. 405 (1938); *Graves* v. *N. Y., ex rel. O'Keefe*, 306 U.S. 466, 486 (1939). And the statute, Section 3401(C), 1954 I.R.C., (26 U.S.C.A.) which defines "employees," for withholding tax purposes, in terms includes state employees. More broadly considered, as Mertens said in commenting upon the 1928 ruling (I.T. 2405), "There seems to be no conceivable ground for this discrimination in favor of such employees." 9 MERTENS, TAXATION (1943), Sec. 49.165, p. 141, n. 41. "As we have frequently pointed out, statutes should be construed to avoid absurd consequences, as Congress must be presumed not to have intended what was absurd. . . ." [fol. 46] *Jacobs* v. *Tawes*, F.2d , (4 cir., 1957).

Accordingly, we hold that Section 6331 authorized levy upon the accrued salary of a state employee.

Sims next contends that, even if the salaries of state employees may be levied upon, he is not subject to the suit for penalty because he is not a "person in possession of (or obligated with respect to)" the property upon which the levy was made. 26 U.S.C.A. Sec. 6332. He argues that if he was in possession of the wages, he was in possession of them (or obligated with respect to them) in his capacity as State Auditor and that, "As an individual, the appellant had no more possession of or control over the wages of the taxpayers than any other individual private citizen of the state." Since the action against him as State Auditor has been dismissed, and he is now being sued only as an individual, Sims concludes that he cannot be liable.

However, by its very definition of the word "person," Section 6332 permits an action against an individual "in

his own person and estate" who has held property subject to levy in a purely representative capacity or whose obligation with respect to property arises solely from his employment. In terms, it includes a person who as "officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation."

We hold that under the laws of West Virginia, the State Auditor is an officer obligated with respect to the salaries of state employees within the meaning of Section 6332. He issues the warrants directing the disbursement of wages, and employees entitled to payment for their services may [fol. 47] enforce their rights by mandamus against him. *State* v. *Sims*, 55 S.E. 2d 505, 133 W. Va. 239 (1949); *State* v. *Sims*, 68 S.E. 2d 489, 490, 136 W. Va. 789 (1952); *State* v. *Sims*, 82 S.E. 2d 321, 328, 140 W. Va. 64 (1954). In addition, the State Auditor is authorized to deduct and withhold sums from employees' wages "to pay taxes as may be required by an act or acts of the congress of the United States of America." 1 W. Va. Code (1955), Sec. 1031(1). Therefore, Sims having been under a duty to surrender the property demanded of him, he is subject to the penalty which Section 6332 imposes upon any person who fails or refuses to honor the levy, namely, liability in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered.

Sims urges, however, that his refusal to honor the notices of levy was an act performed within the scope of his official duty and that he should not be personally liable for the consequences. It is, of course, generally true that a public officer engaged in non-ministerial duties will not be civilly liable for an act performed within the scope of his authority, even if that act is based upon an erroneous construction of law. The rule is a reasonable one, designed to protect public officers from the harassment of private individuals allegedly injured by the official acts, and to insure effective administration of the law. 43 Am. Jur., "Public Officers," Secs. 274, 275, p. 87; *Cooper* v. *O'Connor*, 99 F.2d 135, 138 (D.C. App., 1938); *Randall* v. *Brigham*, 7 Wall. 523, 536 (U.S., 1868); *Papagianakis* v. *The Samos*, 186 F.2d 257, 260 (4 cir., 1950). But that is not to say that the Congress may not insure

the effective administration of the federal tax laws and secure its rights in the collection of revenue by imposing a penalty upon those who refuse to honor government levies. [fol. 48] We do not overlook the fact that the definition of "person" in Section 6332(c), in terms includes an officer or employee of a corporation who, as such officer or employee, is under a duty to surrender property or rights, but does not specifically mention public officers. It is not to be supposed, however, that Congress intended the definition to be restrictive and applicable only to corporate officers. In a legal context where, as we have seen, salaries due public employees are subject to the lien and levy procedures that apply to others, no reason appears for interpreting Subsection (c) of Section 6332 as narrowing the breadth of the other subsections which insure the effectiveness of levies made upon salaries of public employees.

We hold that Congress has imposed the liability of Section 6332 upon any person who refuses to surrender property subject to the provisions of Section 6331, including state officials.

The judgment must, therefore, be

Affirmed.

[fol. 49]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7525

EDGAR B. SIMS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Southern District of West Virginia

JUDGMENT—February 7, 1958

This Cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

Morris A. Soper, United States Circuit Judge.
Simon E. Sobeloff, United States Circuit Judge.
Clement F. Haynsworth, Jr., United States Circuit Judge.

[File endorsement omitted]

[fol. 50]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Title omitted]

PETITION OF APPELLANT FOR REHEARING—
Filed March 7, 1958

To the Honorables the Judges of the United States Court of Appeals for the Fourth Circuit:

Edgar B. Sims, appellant above named, respectfully petitions this Honorable Court for a rehearing of the appeal in the above entitled cause. The petitioner, in support of [fol. 51] his petition, represents to the Court as follows:

1. Petitioner was the appellant in this cause, which was argued on November 21, 1957, and decided by the Court on February 7, 1958, on which latter date judgment was entered. This petition for rehearing is being tendered for filing in accordance with the provisions of Rule 19 of the Revised Rules of the United States Court of Appeals for the Fourth Circuit.

2. Petitioner submits that he has been aggrieved by the opinion of Your Honors rendered in this cause and the judgment entered herein, affirming the judgment from which this appeal was taken. The respects in which petitioner has been aggrieved are hereinafter set forth.

3. Petitioner respectfully urges that Section 6332 of the Internal Revenue Code of 1954 is a penal statute, and as such should be strictly construed. This would preclude the reading into the statute of the words "state" or "officer or employee of a state." Consequently, the term "person," as used in said statute, does not include an officer or employee of a sovereign state and thus, does not include this petitioner.

4. Petitioner concedes that the Constitution of the United States authorizes Congress to enact laws comparable to the sections in question for the purpose of levying on salaries or wages of officers or employees of a state and that this could be accomplished in the same manner as it did to reach officers and employees of the federal government. However, it is respectfully submitted that Congress has not enacted [fol. 52] such laws. Consequently, officers and employees of a state are not included in the law as it exists.

5. Petitioner respectfully directs the attention of this Court to Section 7701 of the Internal Revenue Code of 1954, wherein the definitions of "person," "partnership and partner," and "corporation" are set forth in relation to their use and meaning in the Internal Revenue Code. It is submitted that the state is not included in any of the foregoing terms.

6. Petitioner respectfully urges that Chapter 12, Article 3, Section 13a of the West Virginia Code (Michie, Sec. 1031(1)) was enacted for the specific purposes of enabling deductions to be made from the wages of state employees for the purchase of government bonds and for the withholding of income taxes due from moneys earned in state employment. This is not to say, however, that the legislature intended such statute to be used to permit the service of the instant levies for the collection of delinquent taxes on income earned in ventures other than state employment.

7. Petitioner respectfully submits that any act of Congress, which is contrary to well-established law, thereby imposing personal liability on a public official, who previously was immune therefrom, should be enacted in clear and express terms and not in vague, ambiguous and obscure language which requires interpretation.

Wherefore, petitioner respectfully urges that a rehearing may be granted, and that the mandate of this Court may [fol. 53] be stayed pending the disposition of this petition.

Respectfully submitted,

Edgar B. Sims, Petitioner, By Counsel.

W. W. Barron, Attorney General, Charleston, West Virginia.

Fred H. Caplan, Assistant Attorney General, Charleston, West Virginia, Counsel for Petitioner.

[fol. 55]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—Filed and Entered March 13, 1958

This Court having on February 7, 1958, rendered its decision affirming the judgment of the District Court appealed from in this cause, and the Appellant having on March 7, 1958, filed a petition for rehearing of the said cause, and the same having been carefully considered,

It is now here ordered by this Court that the rehearing asked for, be, and the same is hereby, denied.

Morris A. Soper, United States Circuit Judge.
Simon E. Sobeloff, United States Circuit Judge.
Clement F. Haynsworth, Jr., United States Circuit Judge.

[File endorsement omitted]

March 21, 1958, mandate issued and transmitted to the Clerk of the United States District Court at Charleston, West Virginia.

March 21, 1958, record on appeal and amended record on appeal returned to the Clerk of the United States District Court at Charleston, West Virginia.

[fol. 56] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 57] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Briefs.

SUPREME COURT, U. S.
FILED
JUN 7 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of The United States

OCTOBER TERM, 1957

No. 88

EDGAR B. SIMS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

W. W. BARRON,
Attorney General of West Virginia

FRED H. CAPLAN,
Assistant Attorney General of West Virginia

Counsel for Petitioner
Charleston, West Virginia

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1957

No.....

EDGAR B. SIMS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioner, Edgar B. Sims, prays that a writ of certiorari do issue from the Supreme Court of the United States to review a decision and judgment of the United States Court of Appeals for the Fourth Circuit, made and entered in the above-entitled case on February 8, 1958, by which said United States Court of Appeals affirmed the judgment of the United States District Court for the Southern District of West Virginia, holding said Edgar B. Sims personally liable, purportedly under the provisions of Section 6332 of the Internal Revenue Code of 1954, for his refusal to withhold from the wages of certain state employees sums

of money for the payment of income tax on income earned by said employees in endeavors separate and apart from and entirely unrelated to their state employment. A petition for a rehearing was filed on March 7, 1958, which, by an order dated March 13, 1958, was denied.

OPINIONS BELOW

A judgment order, dated July 24, 1957, was entered against the defendant, Edgar B. Sims, by the Judge of the United States District Court for the Southern District of West Virginia. Said District Court rendered no formal opinion and no opinion is reported. However, the District Judge made a statement from the bench giving his reasons for holding the defendant personally liable, a copy of which is included in the Appendix hereto.

The opinion of the United States Court of Appeals for the Fourth Circuit, included in the Appendix hereto, is reported in 252 F. 2d 434.

JURISDICTION

The judgment of said Court of Appeals was entered on February 7, 1958 (Tr. 24). As heretofore stated, a petition for a rehearing was denied on March 13, 1958 (Tr. 30). There has been no extension of time within which to petition for certiorari nor has there been any stay requested or granted in the execution of the judgment. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the provisions of Sections 6331 and 6332 of the Internal Revenue Code of 1954 apply to states and state officers, and, in particular, to this petitioner, the Auditor of the State of West Virginia.

2. Whether a state auditor who declines to honor a levy served upon him in his official capacity, purportedly under the provisions of Sections 6331 and 6332 of the Internal Revenue Code of 1954 (26 U.S.C. 6331 and 6332), is individually and personally liable under the penal provisions set out in Section 6332(b) of said Code.

3. If, technically, Section 6332(b) applies to states and state officers, said section being penal in nature, should this petitioner be personally liable, in view of the fact that he acted on the advice of the state attorney general and pursuant to an honest interpretation of a statute not heretofore interpreted by this Court and not heretofore judicially settled?

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 are quoted as follows:

Section 6321 (26 U.S.C. 6321). Lien for taxes:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in ad-

dition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

Section 6331 (26 U.S.C. 6331). Levy and distraint:

"(a) *Authority of Secretary or delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401 (d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

"(b) *Seizure and sale of property.*—The term 'levy' as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or

rights to property (whether real or personal, tangible or intangible).

"(c) *Successive seizures.*—Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid."

Section 6332 (26 U.S.C. 6332). Surrender of property subject to levy:

"(a) *Requirement.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

"(b) *Penalty for violation.*—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

"(c) *Person defined.*—The term 'person,' as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation."

Section 7403 (26 U.S.C. 7403). Action to enforce lien or to subject property to payment of tax:

"(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

"(b) *Parties.*—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

"(c) *Adjudication and decree.*—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

"(d) *Receivership.*—In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary or his delegate during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity."

Internal Revenue Code—1939, Section 3678: Civil action to enforce lien on property:

"(a) *Filing.* In any case where there has been a refusal or neglect to pay any tax, and it has become necessary to seize and sell property and rights to property, whether real or personal, to satisfy the same, whether distraint proceedings have been commenced or not, the Attorney General at the request of the Commissioner may direct a civil action to be filed, in a district court of the United States, to enforce the lien of the United States for tax upon any property and rights to property, whether real or personal, or to subject any such property and rights to property owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax.

"(b) *Parties to proceedings.* All persons having liens upon or claiming any interest in the property or rights to property sought to be subjected as aforesaid shall be made parties to such proceedings and be brought into court.

"(c) *Adjudication and decree.* The said court shall, at the term next after the parties have been duly notified of the proceedings, unless otherwise ordered by the court, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and

liens upon the property and rights to property in question, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property and rights to property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

"(d) *Receivership.* In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Commissioner during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity."

Chapter 12, Article 3, Section 13a, West Virginia Code.

"*Deductions by State Auditor from Salaries of State Officials and Employees to Pay Taxes and Purchase United States Government Bonds.* —The auditor of the State of West Virginia is authorized to deduct and withhold sums from the salaries or other compensation of state officials and employees, to purchase United States government bonds and other United States government obligations, or to pay taxes as may be required by an act or acts of the congress of the United States of America.

"The auditor of the State of West Virginia shall, upon the written request or order of any state official or employee, deduct and withhold sums from the salaries or compensation of state officials and employees to make voluntary purchases of United States government bonds or other United States government obligations for such officials or employees.

"The auditor shall keep an account of the accumulated deductions of each state official and employee and shall issue receipts to state officials and employees for all sums deducted and withheld as herein provided. The sums, when deducted, shall be transferred by the auditor to a special fund in the state treasury, and, as soon as reasonably convenient, transmitted to the treasurer of the State of West Virginia, as an issuing agent of federal securities, or such other official or agent of the United States government designated by the secretary of the treasury of the United States of America, from time to time.

"Should any official or employee leave the employ of the State at a time when there is not sufficient accumulation of deductions from his salary or compensation to purchase a United States government bond then the auditor shall either purchase United States government savings stamps in the amount of the accumulation or refund to the official or employee the accumulation as an erroneous payment into the special fund herein created.

"The auditor shall be responsible for the delivery of United States government bonds or obligations purchased with the deductions from the salaries or compensation of state officials and employees only when the United States government bonds or obligations are presented to him by the official or agent of the United States government for delivery to the state officials or employees.

"To promote efficiency and economy in making such deductions as provided herein, the auditor is authorized to promulgate rules and regulations and to designate the time for the presentment of the pay roll requisitions for state

officials and employees and requisitions for other claims against the State: Provided, that all officials and employees shall be paid at least once every thirty-one days. All officials and employees of the State shall comply with the rules and regulations promulgated by the auditor under this section."

STATEMENT

The United States instituted a civil action against this petitioner, as Auditor of the State of West Virginia and as an individual, pursuant to the hereinafter-described factual situation. As stated in the complaint filed in the United States District Court for the Southern District of West Virginia (Tr. 1-A), certain employees of said state failed to pay taxes to the federal government on incomes earned by them in employment separate and apart from, and entirely unrelated to, their state employment. In relation to any moneys earned by them, as employees of the state, taxes thereon have been withheld by the state and have been remitted to the Director of Internal Revenue. No taxes are owed by such employees to the government for any wages earned pursuant to their state employment. This case arose only on account of the additional money earned by such employees in various endeavors entirely separate and apart from state employment.

The district director, after having made demands upon such taxpayers, and after having failed to receive payment, served, in each instance, a Notice of Levy on the State of West Virginia by serving a copy thereof on Edgar B. Sims, Auditor, State of West Virginia. Four of such notices were addressed to the State of West Virginia, as the name of the person

holding property, moneys, etc., belonging to the taxpayer. One was addressed to "Edgar B. Sims, State Auditor of the State of West Virginia." All of such notices were served on Edgar B. Sims, Auditor, State of West Virginia. The government claimed as authority for the service of such notices Sections 6331 and 6332 of the Internal Revenue Code of 1954.

On the advice of the office of the Attorney General of West Virginia, this petitioner, acting in his official capacity as auditor of said state, and exercising the discretion he believed required of him, refused to honor said Notices of Levy. The government subsequently instituted an action against this petitioner as auditor of the state and as an individual. As a result of his motion to dismiss (Tr. 13-A), the defendant, as auditor, was dismissed, but the suit was maintained against him in his individual capacity (Tr. 15-A). On May 23, 1957, this case was heard by the Judge of the District Court, on argument of counsel, whereupon the court rendered its decision in favor of the United States. The opinion of the court was stated orally at the conclusion of argument by counsel, there being no written opinion. Pursuant thereto, the court, on July 24, 1957, entered its order (Tr. 25-A).

An appeal was taken to this judgment (Tr. 10), and, after hearing the case on argument and briefs of counsel, the United States Court of Appeals for the Fourth Circuit, on February 7, 1958, affirmed the holding of the District Court (Tr. 24). A petition for a rehearing of the case was denied on March 13, 1958 (Tr. 30).

Basis of Federal Jurisdiction in Court of First Instance

The court of first instance in this case was the United States District Court for the Southern District of West Virginia. The complaint of the United States based the jurisdiction of such court on the provisions of Sections 7401, 6331 and 6332 of the Internal Revenue Code of 1954.

REASONS FOR GRANTING WRIT

The United States Court of Appeals for the Fourth Circuit, in the decision sought to be reviewed:

1. Has decided important questions of federal law which have not been, but should be, settled by this Court.

In support of its decision, holding Edgar B. Sims, Auditor of the State, personally liable, the Court of Appeals relies, in part, on certain cases wherein it was held that the United States could enforce its tax lien against moneys owed by the state to a delinquent taxpayer and that in so doing it can include the state in the suit as a party defendant. It cites *United States* v. *Newhard*, 128 F. Supp. 805 (1955), and *United States* v. *Graham*, 96 F. Supp. 318 (1951). That the *Newhard* case is not authority for holding a state officer personally liable is evidenced by the following language, contained in the opinion thereof:

> "The plaintiff expressly denies that it is attempting to secure a penalty judgment against the County Treasurer of the County pursuant to

§ 3710(b), 26 U.S.C.A., but asserts that it is trying to enforce its lien by civil action pursuant to § 3678, 26 U.S.C.A. * * *"

The action in that case was instituted under Section 3678 of the Internal Revenue Code of 1939 (now Section 7403 of the IRC, 1954), not under Section 3710, which is the same as the present Section 6332. No attempt therein was made to apply the latter statute, which is penal in nature. The same is true of the *Graham* case, *supra*.

The court below noted that as early as 1935 the government sought to levy upon the accrued salary of an employee of a county and cited *United States* v. *Brechtel*, 90 F. 2d 516 (1937), as an example thereof. Judgment was entered against the government. Regardless of the reason for such judgment, that case clearly did not resolve any of the questions presented for consideration in the instant case.

The foregoing emphasizes the uncertainty with which the decision below was reached and points up the necessity for an adjudication of these questions by this Court. An examination of the cases fails to reveal that this Court or any other federal court has actually considered or decided whether the provisions of said Sections 6331 and 6332 apply to states and state officers; or whether a state officer, under the circumstances described in this case, should be held personally liable under the penal provisions of Section 6332.

The Court of Appeals, in its efforts to answer the pertinent questions involved in this case, actually rendered its interpretation of Section 7403 of the Internal

Revenue Code of 1954 (action to enforce lien or to subject property to payment of tax), and cited cases instituted pursuant thereto. It reasoned that since said Section 7403 has been held to apply to states, Sections 6331 and 6332 would likewise apply. Although all of these sections deal with the collection of delinquent taxes, it is significant that the former provides for proceedings against property while the latter two are against persons and are penal in nature. An interpretation thereof based on comparison should not be allowed to stand as the law without consideration thereof by this Court.

To the best of our knowledge, based on a thorough examination of the authorities, this Court has never been called upon to interpret said Sections 6331 and 6332, in relation to their application to states and states officers, and, in particular, to the matter of personal liability of a state officer under the circumstances set out herein. This is believed to be an important federal question which should be settled by this Court.

It is important that this Court review the proceedings in the court below for the additional reason that the decision, as it now stands, can have a grave effect on the future actions of the great numbers of public officials throughout the United States. Heretofore, a public official, performing a discretionary duty within the scope of his authority, was granted immunity from personal liability, even though he had adopted a mistaken construction of an act of Congress or a state statute. 43 Am. Jur. 85, Public Officers, Section 273; 67 C.J.S. 417, Public Officers, Section 125; *Cooper* v. *O'Connor*, 99 F. 2d 135 (1938).

The Court of Appeals has now held that the above general and well-established rule of law has been changed by Congress and that a state officer may be held personally liable under the penal provisions of Section 6332 of the Internal Revenue Code of 1954. It is pertinent that the language of such section fails to include specifically public officers and that the decision of the court below was arrived at by an interpretation thereof. The possible effect of this decision on the future actions of public officers is ominous. Under circumstances where a public officer is under a duty to exercise discretion in disbursing public funds, it can readily be seen that he may now be reluctant to perform such duty. With the threat of personal liability existing where it did not heretofore exist, it is conceivable that he would refuse to exercise the required discretion, thereby, in some instances, depriving the public of the protection of law.

It is submitted that this important question has not been, but should be, considered and settled by this Court.

2. Has decided federal questions in a way in conflict with applicable decisions of this Court and with those of other courts of appeals.

The Court of Appeals has held that the term "person," as used in Section 6332, includes a state. It is believed that such view is contrary to the decision of this Court, as expressed in *United States* v. *Baltimore and Ohio Railroad Company*, 84 U.S. 322, 21 L.Ed. 597 (1873). Therein the Court held that the terms "person" and "corporation," as used in the Acts of Congress touching internal revenue do not include a state.

While the court below clearly admits that the definition of "person", in Section 6332 (c), does not specifically mention public officers, it, in effect, says that it would be absurd to exclude them from such definition. The Supreme Court of the United States, in forceful and cogent language, has held that great caution must be exercised in rejecting the literal meaning of a statute in favor of a construction in harmony with the *supposed* spirit and purpose thereof. In *Crooks* v. *Harrelson*, 282 U.S. 55, 75 L.Ed. 156 (1930), the court said:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. Monson v. Chester, 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the suprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts. * * *"

It is submitted that the opinion of the Court of Appeals is in conflict with the opinion in *Crooks* v. *Harrelson*, *supra*. In the instant case, the court below, on the basis of absurdity, has chosen to insert certain

words into a statute, thereby changing such statute to include what it believes Congress desired to include. This Court has said that this should not be done; that, if a law is objectionable, the remedy lies with the law making authority, and not with the courts. See also *Pennsylvania Railroad Co.* v. *Chesapeake and Ohio Railroad Co.*, 229 F. 2d 721 (1956) and *St. Louis Co.* v. *United States*, 237 F. 2d 151 at 158 (1956), both of which cite *Crooks* v. *Harrelson, supra*, for the above proposition of law. The above-quoted language of the *Crooks* case is set out in full in the opinion of *St. Louis* v. *United States, supra*..

This matter of interpretation becomes all the more important in view of the fact that the construction of a tax statute is involved. It is the generally accepted view that a tax measure should be strictly construed, and whatever doubts exist therein should be resolved against the government. *Shwab* v. *Doyle*, 258 U.S. 529, 66 L.Ed. 747 (1922); *Gould* v. *Gould*, 245 U.S. 151, 62 L.Ed. 211 (1917); *United States* v. *Merriam*, 263 U.S. 179, 68 L.Ed. 240 (1923). In the instant case, not only a tax measure, but one penal in nature, is involved. In construing such statute, the court below has expanded its meaning beyond the actual language contained therein. It is believed that this constitutes a conflict with the decisions of this Court and with those of other Courts of Appeals, which should be resolved by the review herein sought.

The case under consideration concerns the personal liability of Edgar B. Sims, Auditor of the State of West Virginia. In *Cooper* v. *O'Connor*, 99 F. 2d 135 (1938), Associate Justice Miller of the United States Court of

Appeals for the District of Columbia said, in relation to personal liability of public officials:

> "* * * if the act complained of was done within the scope of the officer's duties as defined by law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discretion, or because of an erroneous construction and application of the law. * * *"

While the court below, in the instant case, appeared to agree with the proposition of law expressed therein, it did not follow such case in its decision. It makes no distinction between public officers and officers of a corportion or other private association. By reason thereof, it is believed that its decision is in direct conflict with that of the *Cooper* case. It is respectfully submitted that this conflict should be settled by this Court.

Further, in relation to this matter of construction of statutes by the courts, it is noteworthy to consider the comments of the Court of Appeals, in regard to *Smith* v. *Jackson*, 246 U.S. 388, 62 L. ed. 788 (1918). Therein the court pointed out that a federal disbursing officer has no right to set-off, against a federal employee's salary, for debts owing to the United States. The Court of Appeals, in the instant case, reasoned as follows: "Undoubtedly, Section 6331 was designed to alleviate this difficulty and to subject federal employees to the same collection procedures as are available against all other taxpayers, including employees of the state." Why could not the court have interpreted "any person" to include the federal government? It had no difficulty in doing so to include states. Why was the

statute (6331) amended to specifically include the federal government? It is respectfully urged that the same need exists to include specific words bringing states within the statute as existed in amending the statute to include the federal government. It is believed that this matter should be adjudicated by this Court.

The Court of Appeals held that Chapter 12, Article 3, Section 13a, of the West Virginia Code (Michie, 1031(1)) authorized the State Auditor to deduct and withhold sums from employees' wages as demanded in the levy. Said Section 13a is quoted herein under STATUTES INVOLVED. It was enacted in 1943, at a time when all means were directed to enhance our war efforts. One of its main purposes was to facilitate the purchase of government bonds. The other purpose was to permit deductions from wages for the payment of income taxes directly to the government. This is not to say, however, that our Legislature thereby intended to discard the sovereignty of the State and to make it a general agent for the collection of delinquent taxes, regardless of the source of income. It is earnestly urged that the purpose of said Section 13a was confined to the above two objectives and was not designed to authorize the Auditor to withhold sums pursuant to the instant levy.

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be granted.

Respectfully submitted,

W. W. BARRON,
Attorney General of West Virginia

FRED H. CAPLAN,
Assistant Attorney General of West Virginia

Counsel for Petitioner

Charleston, West Virginia

APPENDIX

1. OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 7525

EDGAR B. SIMS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Argued Nov. 21, 1957

Decided Feb. 7, 1958

Fred H. Caplan, Asst. Atty. Gen., of West Virginia (W. W. Barron, Atty. Gen., of West Virginia, on brief), for appellant.

Mildred L. Seidman, Atty., Dept. of Justice, Washington, D. C. (Charles K. Rice, Asst. Atty. Gen., Lee A. Jackson and Melva M. Graney, Attys., Dept. of Justice, Washington, D. C., Duncan W. Daugherty, U. S. Atty., Huntington, W. Va., and Percy H. Brown, Asst. U. S. Atty., Charleston, W. Va., on brief), for appellee.

Before SOPER, SOBELOFF, and HAYNSWORTH, Circuit Judges.

SOBELOFF, Circuit Judge.

The sole issue in this case is whether a state official who makes payment of accrued salaries to state employees in disregard of a notice of levy by the Commissioner of Internal Revenue for taxes due the United States by such employees may be held personally liable.

Edgar B. Sims, State Auditor of West Virginia, appeals from a judgment of $519.71 entered against him individually in favor of the United States for refusing to surrender the accrued wages of three employees of the state after the District Director of Internal Revenue had served notices of levy upon him.

The three employees owed federal taxes upon earnings in endeavors apart from their state employment. The Commissioner of Internal Revenue made an assessment of tax deficiencies as to each and forwarded the assessments to the Director of Internal Revenue at Parkersburg, West Virginia, for collection. The Director demanded payment from each of them, and, the deficiencies remaining unpaid for more than ten days, he served on the State Auditor notices of levy upon their accrued salaries pursuant to Section 6331 of the 1954 Internal Revenue Code (26 U.S.C.A.). When the levies were made, the three employees had accrued "take home pay" totalling $519.71.

On the advice of the office of the Attorney General of West Virginia, the appellant refused to honor the notices of levy, and issued to each of the employees a warrant for the payment of his salary.

Thereafter, the government brought this suit in the United States District Court for the Southern District of West Virginia against Sims pursuant to Section

6332 of the 1954 Internal Revenue Code (26 U.S.C.A.), to recover a sum equal to the value of the property not surrendered. As originally brought, the suit was against Sims individually and as Auditor of the State of West Virginia. The defendant filed a motion to dismiss the action, and the Court granted it insofar as it related to the defendant as Auditor of West Virginia, but overruled it as to Sims in his individual capacity. On the stipulated facts, the court entered judgment against Sims in the amount of $519.71 plus interest, and this appeal followed.

In unambiguous terms, Section 6331 authorizes the collection of delinquent taxes "by levy upon all property and rights to property" belonging to a delinquent taxpayer; and it is not disputed that, in general, accrued wages are properly subject to levy. 9 Mertens, Taxation (1943), Sec. 49.165; United States v. Long Island Drug Co., 2 Cir., 1940, 115 F.2d 983, 986. See: 26 C.F.R. Sec. 301.6331-1(a) (1); II-1 Cum. Bull., 172 (I.T.1557) (1923).

In spite of the Statute's broad language, the appellant contends that the accrued salaries of state employees must be treated differently. He relies heavily on the fact that in 1928 the Internal Revenue Service itself rules that salaries of certain municipal officers were not subject to distraint while in the hands of a city treasurer. VII-1 Cum.Bull., 72 (I.T.2405) (1928). Since this ruling was not expressly revoked until 1955 (1955-1 Cum.Bull., 551 Rev.Rule 55-227), Sims contends that "there appears to have been congressional acquiescence in the longstanding interpretation."

Administrative interpretations are not absolute rules of law which must necessarily be followed

in every instance, but are only helpful guides to aid courts in their task of statutory construction. The extent to which a court will place reliance upon an administrative interpretation depends on the circumstances, including the general purpose of the act, the authoritative source of the regulation or ruling, the clarity of the statutory language, the consistency of administrative policy, and whether administrative interpretation was brought to the attention of the legislators when they re-enacted, modified, or refused to change the statute. Cf., e. g., Helvering v. New York Trust Co., 1934, 292 U.S. 455, 54 S.Ct. 806, 78 L.Ed. 1361; United States v. Leslie Salt Co., 1955, 350 U.S. 383, 76 S.Ct. 416, 100 L.Ed. 441. See: Brown, "Regulations, Reenactment and the Revenue Acts," 54 Harv. L.Rev. 377 (1941).

Since departmental rulings not promulgated by the Secretary of the Treasury "do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary" (see the cautionary notice published as a preface to the Cumulative Bulletins), Mr. Justice (later Chief Justice) Stone referred to them as being "of little aid in interpreting a tax statute." Biddle v. Commissioner, 1938, 302 U.S. 573, 582, 58 S.Ct. 379, 383, 82 L.Ed. 431. The first authoritative declaration was not made until 1955, shortly after the enactment of the Internal Revenue Code of 1954 (but before the levy in this case), when a Treasury Regulation, 26 C.F.R. Sec. 301.6331-1(a) (4) (ii), expressly declared that Section 6331 permitted levy on accrued salaries of state and municipal employees. That the Treasury Department was not committed to the 1928 ruling

(I.T.2405) is borne out by the fact that there was no uniform adherence to its principle, but rather that it was repeatedly, if not consistently, ignored. It is noted that as early as 1935, the Government sought to levy upon the accrued salary of an employee of Woodbury County, Iowa. See: United States v. Brechtel, 8 Cir., 1937, 90 F.2d 516. There are numerous other instances of levies on state employees' salaries.

It does not appear that Congress was, at any time, cognizant of the 1928 ruling (I.T.2405), and, for this additional reason, it cannot be said that it received legislative ratification. "Whenever congressional awareness of the administrative interpretation does not appear and seems unlikely, the basis for the re-enactment rule vanishes." Davis, Administrative Law (1951), Ch. 5, Sec. 59, p. 208. Dean Griswold has said, "* * * the mere re-enactment of a statute following administrative construction should be given no weight whatever in determining the proper construction of the statute." Griswold, "A Summary of the Regulations Problem," 54 Harv.L. Rev. 398, 400 (1941). The evidence is to the contrary of the basic assumption of the re-enactment rule, for when the Chief of Staff of the Joint Committee on Internal Revenue Taxation inquired, in 1950, whether the statutes relating to levy were applicable to a state, the Acting Commissioner of Internal Revenue replied in a letter that "this office believes it has the authority to collect taxes from State employees and contractors who are delinquent as regards those taxes by service of notices of levy on State officials holding monies due to those delinquent taxpayers." Thus, if any Congressional ratification of administrative policy is to be

found, it would appear that Congress ratified the practice of which it was specifically made aware rather than the earlier ruling of which there is no evidence that it had any knowledge.

The appellant has suggested that the express provision in Section 6331 for levy upon the accrued salaries of employees of the federal government and the omission of reference to state employees indicate an intention on the part of the legislators to withhold authorization from the Commissioner of Internal Revenue with respect to the latter. The legislative history of Section 6331 does not reveal the existence of any such negative intention, however, and both the House and the Senate Committee Reports merely contain the statement that "The provisions as to levy on salaries of Government employees are the same as those applicable to any other delinquent taxpayer." H.Rep. No. 1337, 83rd Cong. 2nd Sess., S.Rep.No.1622, 83rd Cong. 2nd Sess., 1954 U.S.Code Cong. and Adm.News, pp. 4556, 5225.

Another and more likely explanation is at hand for the specific reference in Section 6331 to levy upon federal employees' salaries and the failure to mention state employees. It lies in a problem peculiar to the federal government. In Smith v. Jackson, 1918, 246 U.S. 388, 38 S.Ct. 353, 62 L.Ed. 788, it was held that a federal disbursing officer has no right to set-off against a federal employee's salary, for debts owing to the United States. Accordingly, the Comptroller General ruled that notices of levy are "attempts to set off the tax indebtedness due to the United States against moneys due from the United States to the debtor," and "the administrative official served with

such notice would be without authority to withhold any portion of the current salary of such employee in satisfaction of the notices of levy and distraint." 26 Comp. Gen. 907, 912 (1947). Undoubtedly, Section 6331 was designed to alleviate this difficulty and to subject federal employees to the same collection procedures as are available against all other taxpayers, including employees of the state.

It is noteworthy that a closely related collection remedy, the tax lien, has been held applicable to money in the hands of a state. Where the State of California owed rent to a delinquent taxpayer, it was held that the Government could establish a lien upon it, and that the state could properly be subjected to a suit to foreclose the lien. United States v. Graham, D.C.S.D.Cal.1951, 96 F.Supp. 318, affirmed sub. nom. State of California v. United States, 9 Cir., 1952, 195 F.2d 530, certiorari denied 344 U.S. 831, 73 S.Ct. 36, 97 L.Ed. 647. See also, United States v. Newhard, D.C.W.D.Pa. 1955, 128 F.Supp. 805, where the government successfully enforced a tax lien against the wages of a county employee. It would indeed be an incongruity for the lien and levy provisions to receive contrary interpretations, particularly as language of Section 6321, which provides for "a lien in favor of the United States upon all property and rights to property" of a delinquent taxpayer, is almost identical with the language of Section 6331. Neither logic nor the language of the statute demands such a result.

There is no Constitutional requirement that the salaries of state employees shall be treated differently from the salaries of others. Helvering v. Gerhardt, 1938, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427; Graves

v. People of State of New York ex rel. O'Keefe, 1939, 306 U.S. 466, 486, 59 S.Ct. 595, 83 L.Ed. 927. And the statute, Section 3401(C), 1954 I.R.C., (26 U.S.C.A.) which defines "employees," for withholding tax purposes, in terms includes state employees. More broadly considered, as Mertens said in commenting upon the 1928 ruling (I.T. 2405), "There seems to be no conceivable ground for this discrimination in favor of such employees." 9 Mertens, Taxation (1943), Sec. 49.165, P. 141, n. 41. "As we have frequently pointed out, statutes should be construed to avoid absurd consequences, as Congress must be presumed not to have intended what was absurd * * *." Jacobs v. Tawes, 4 Cir., 1957, 250 F.2d 611, 615.

Accordingly, we hold that Section 6331 authorized levy upon the accrued salary of a state employee.

Sims next contends that, even if the salaries of state employees may be levied upon, he is not subject to the suit for penalty because he is not a "person in possession of (or obligated with respect to)" the property upon which the levy was made. 26 U.S.C.A. § 6332. He argues that if he was in possession of the wages, he was in possession of them (or obligated with respect to them) in his capacity as State Auditor and that, "As an individual, the appellant had no more possession of or control over the wages of the taxpayers than any other individual private citizen of the state." Since the action against him as State Auditor has been dismissed, and he is now being sued only as an individual, Sims concludes that he cannot be liable.

However, by its very definition of the word "person," Section 6332 permits an action against an individual

"in his own person and estate" who has held property subject to levy in a purely representative capacity or whose obligation with respect to property arises solely from his employment. In terms, it includes a person who as "officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation."

We hold that under the laws of West Virginia, the State Auditor is an officer obligated with respect to the salaries of state employees within the meaning of Section 6332. He issues the warrants directing the disbursement of wages, and employees entitled to payment for their services may enforce their rights by mandamus against him. State ex rel. Board of Governors of West Virginia University v. Sims, 1949, 133 W. Va. 239, 55 S.E.2d 505; State ex rel. Board of Governors of West Virginia University v. Sims, 1952, 136 W.Va. 789, 68 S.E.2d 489, 490; State ex rel. Board of Governors of West Virginia University v. Sims, 1954, 140 W.Va. 64, 82 S.E.2d 321, 328. In addition, the State Auditor is authorized to deduct and withhold sums from employees' wages "to pay taxes as may be required by an act or acts of the congress of the United States of America." 1 W.Va.Code (1955), Sec. 1031(1) [12-3-13a]. Therefore, Sims having been under a duty to surrender the property demanded of him, he is subject to the penalty which Section 6332 imposes upon any person who fails or refuses to honor the levy, namely, liability in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered.

Sims urges, however, that his refusal to honor the notices of levy was an act performed within the

scope of his official duty and that he should not be personally liable for the consequences. It is, of course, generally true that a public officer engaged in non-ministerial duties will not be civilly liable for an act performed within the scope of his authority, even if that act is based upon an erroneous construction of law. The rule is a reasonable one, designed to protect public officers from the harassment of private individuals allegedly injured by the official acts, and to insure effective administration of the law. 43 Am.Jur., "Public Officers," Secs. 274, 275, p. 87; Cooper v. O'Connor, 1938, 69 App.D.C. 100, 99 F.2d 135, 138, 118 A.L.R. 1440; Randall v. Brigham, 1868, 7 Wall. 523, 536, 19 L.Ed. 285; Papagianakis v. The Samos, 4 Cir., 1950, 186 F.2d 257, 260. But that is not to say that the Congress may not insure the effective administration of the federal tax laws and secure its rights in the collection of revenue by imposing a penalty upon those who refuse to honor government levies.

We do not overlook the fact that the definition of "person" in Section 6332 (c), in terms includes an officer or employee of a corporation who, as such officer or employee, is under a duty to surrender property or rights, but does not specifically mention public officers. It is not to be supposed, however, that Congress intended the definition to be restrictive and applicable only to corporate officers. In a legal context where, as we have seen, salaries due public employees are subject to the lien and levy procedures that apply to others, no reason appears for interpreting Subsection (c) of Section 6332 as narrowing the breadth of the other subsections which insure the effectiveness of levies made upon salaries of public employees.

We hold that Congress has imposed the liability of Section 6332 upon any person who refuses to surrender property subject to the provisions of Section 6331, including state officials.

The judgment must, therefore, be

Affirmed.

2. STATEMENT OF ORAL OPINION OF DISTRICT COURT

THE COURT: I wish that there were some precedent for a construction of these statutes as they apply to a situation such as is before me here. I am sure that any precedent would be helpful, and if we had some decision which was binding on this court I would, of course, follow that decision; but having no precedent at all, then it is the duty of the court as I see it to do the best it can to interpret the statutes and apply them to the facts of the case.

While I am somewhat disturbed by the provisions of Section 6332 (c) defining a person in that it does not mention officers or employees of a state, I think that there might be a valid argument that in not mentioning them they were intended to be excluded, but that would lead as I view it to a very illogical and unreasonable result.

As pointed out, while Section 6331 provides a method for levying on accrued salaries and wages of various federal employees and officials, there would be no way to collect any such levy if those departmental officials

of the federal government were not held to be included as persons, then there is no reason why a departmental official of a state government should not also be included as a person.

I think under the provisions of Section 6332 (a), particularly the parenthetical phrase, that the state auditor was obligated with respect to the moneys which are due to employees in view of the fact that if an employee's wages were withheld and he felt that he had the right to payment of wages, his remedy would be by a writ of mandamus against the auditor, which would certainly not operate on the auditor in his capacity as an arm of the State of West Virginia and would necessarily operate upon him in his personal and individual capacity, and he would be required individually to comply with any order of the court that was made.

Now, being obligated with respect to that debt of the state and being, as I believe, included in the definition of person, I think that the law is clear that demand having been made on him for the payment of the money, and he having refused to pay it and having paid it over instead to the employee, and further in view of the statute which does give him authority to deduct and withhold sums from the salaries of state employees to pay taxes as may be required by act of Congress, that plaintiff here has established its clear right to the relief for which it asks.

I shall not attempt to state the amount because that can be gathered from the stipulation of facts, but the United States will be given a judgment against the defendant Edgar B. Sims individually for the amount of taxes as ascertained by the stipulation.

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1958

No. 88

EDGAR B. SIMS,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals (R. 28-37) is reported at 252 F. 2d 434.

JURISDICTION

The judgment of the Court of Appeals was entered February 7, 1958 (R. 37-38). On March 7, 1958, petitioner filed a petition for rehearing (R. 38-40), which

was denied by order dated March 13, 1958 (R. 40). Petition for a writ of certiorari was filed on June 7, 1958, and was granted on October 13, 1958 (R. 41). The jurisdiction of this Court rests on 28 U.S.C. 1254(1). See also Rule 19.1(b) of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Whether the provisions of Sections 6331 and 6332 of the Internal Revenue Code of 1954 apply to states and state officers, and, in particular, to this petitioner, the Auditor of the State of West Virginia.

2. Whether a state auditor who, in the performance of his official duties and upon the advice of the attorney general, declines to honor a levy served upon him in his official capacity, under the provisions of Section 6331 of the Internal Revenue Code of 1954, is individually and personally liable under the penal provisions set out in Section 6332(b) of said Code.

STATUTES INVOLVED

The following statutes are involved in this case and are set out in full in the Appendix of this brief:

> 26 U.S.C. 6321, 26 U.S.C. 6331, 26 U.S.C. 6332, 26 U.S.C. 7403, Chapter 12, Article 3, Section 13a, of the West Virginia Code.

26 U.S.C. 7701 is quoted, in part, in the body of this brief.

STATEMENT

The United States has obtained a judgment against this petitioner, in his individual capacity, under the penal provisions of Section 6332(b) of the Internal Revenue Code of 1954 (R. 18). As stated in the complaint filed in the United States District Court for the Southern District of West Virginia (R. 1-9), certain employees of said State failed to pay taxes to the federal government on incomes earned by them in employment separate and apart from, and entirely unrelated to, their state employment. Taxes on wages earned by them as state employees were withheld in accordance with law and were remitted to the Director of Internal Revenue. Consequently, no taxes are owed by such employees to the federal government for any income earned pursuant to their state employment.

The district director, having made demands for payment upon such taxpayers, and having failed to receive payment, served, in each instance, a Notice of Levy on the State of West Virginia (R. 5, 19) by serving a copy thereof on Edgar B. Sims, Auditor, State of West Virginia. Four of such notices were addressed to the State of West Virginia, as the person holding property, moneys, etc., belonging to the taxpayer. One was addressed to "Edgar B. Sims, State Auditor of the State of West Virginia." All of such notices were served on Edgar B. Sims, Auditor, State of West Virginia (R. 20). The government claimed as authority for the service of such notices Section 6331(a) of the Internal Revenue Code of 1954 (R. 5).

On the advice of the State Attorney General, this petitioner, acting in his official capacity as auditor and

exercising the discretion he believed required of him, refused to honor said Notices of Levy. The United States subsequently instituted an action against this petitioner as auditor of the state and as an individual. As a result of his motion to dismiss (R. 10), the defendant as auditor was dismissed, but the suit was maintained against him in his individual capacity (R. 11-12). On May 23, 1957, this case was heard by the Judge of the aforesaid District Court. After argument of counsel, the court rendered its decision in favor of the United States. Although no written opinion was rendered, a memorandum of the court's oral opinion was forwarded to counsel (R. 25). Pursuant thereto, the court, on July 24, 1957, entered its judgment order (R. 18).

Upon appeal from this judgment, the United States Court of Appeals for the Fourth Circuit, on February 7, 1958, entered its order affirming the holding of the District Court (R. 37-38). A petition for a rehearing was filed on March 7, 1958 (R. 38-40), and was denied on March 13, 1958 (R. 40). This Court's order granting a petition for a writ of certiorari was entered on October 13, 1958 (R. 41).

ARGUMENT

I

The Term "Person," as Used in Section 6332 of the Internal Revenue Code of 1954, Does Not Include a State or an Officer or Employee Thereof. The Statute, Being Penal in Nature, Should be Strictly Construed.

It is most pertinent to the consideration of this matter that the language of Section 6332 of the Internal Revenue Code of 1954 fails to include the state or an officer or employee thereof. Such section, in providing for the surrender of property subject to levy, relates, not to taxpayers, but to those in possession of or owing property to the taxpayer. A duty is thereby imposed upon any person in possession of property or rights of a taxpayer to surrender such property or rights to the Secretary or his delegate. Subsection (b) thereof provides a penalty for the violation of such duty. This is the penalty to which the petitioner, Edgar B. Sims, has been subjected by the court below.

The question now necessarily arises as to what the term "person" means and includes, as used in said Section 6332. In setting out the requirement and penalty for the violation thereof the word "person" is used. Subsection (c) defines person in the following manner:

> "(c) Person defined.—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or em-

ployee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation."

A further definition of "person" is set out as follows, in 26 U.S.C. 7701. Definitions:

> "(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—
>
> "(1) Person.—The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation."

An examination of the foregoing definitions readily reveals that neither a state nor an officer or employee thereof is included in the term "person," as used in Section 6332. Such definitions list what "person" intends to mean and include. It includes an individual, a trust, estate, partnership, association, company or corporation. It further includes an officer or employee of a corporation or a member or employee of a partnership. Nowhere does the definition of "person" include a state or an officer or employee thereof. The language is thus clear and unambiguous, and, in such instances it is the duty of the courts to enforce it according to its obvious terms. In such case there is no necessity for construction. In support thereof, this court said, in *Yates* v. *United States*, 354 U.S. 298, 1 L. ed. 2d 1356 (1957):

> "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction."

This is such a well established principle of law that we believe it unnecessary to cite further cases in support thereof.

Applying this general rule of law to the case at bar, it is submitted that Congress, in enacting Section 6332, did not include a state within the meaning of the term "person." The language, being clear and unambiguous, the courts below should not have construed such statute to mean what they believed Congress intended.

It is particularly pertinent that, in deciding the instant case, both the District Court and the Court of Appeals readily acknowledged that neither officers nor employees of a state were mentioned in Section 6332 (c). However, each court held that to exclude states from the operation of the statute would lead to an illogical, absurd and unreasonable result. In relation thereto, this Court has forcefully stated that great caution must be exercised in rejecting the literal meaning of a statute in favor of a construction in harmony with the *supposed* spirit and purpose thereof. This was cogently stated in *Crooks* v. *Harrelson*, 282 U.S. 55, 75 L.ed. 156 (1930), wherein the Court said:

> "Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. Monson v. Chester, 22 Pick. 385, 387. It is not

> enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts."

In view of this pertinent language, should the courts below have read words into the statute merely because of a supposed absurdity? If the language of a statute reaches an absurd result, is it not up to Congress to correct such statute? The petitioner respectfully urges that it is.

The legislative history of Section 6332 fails to reveal that Congress intended for its provisions to relate to states. Section 6332 is similar to Section 3710 of the Internal Revenue Code of 1939, which was derived from the Act of February 26, 1926, C. 27, Sec. 1114(e) and (f), 44 Stat. 117. An examination of said Sec. 1114(e) and (f) in the United States Statutes at Large reveals basically the same language as that contained in Section 3710, I.R.C., 1939. To show the similarity between the existing statute (Sec. 6332) and Sec. 1114(e) and (f), 1926 Acts, the latter is quoted as follows:

> "'(e) Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right

is, at the time of such demand, subject to an attachment or execution under any judicial process. Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

"'(f) The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.'"

It is significant that Congress, upon revising the internal revenue laws in 1926, in 1939 and in 1954, retained basically the same language insofar as penalties are concerned and did not, in any instance, include the state, or an officer or employee thereof. Also, the definitions of "person" remained the same.

In the Senate Report, during the consideration of H. R. 8300 (IRC, 1954), it was stated that Section 6331 continued in effect 3690 and 3692 of the 1939 Internal Revenue Code. The Senate Committee clarified the provisions of the House bill by expressly providing that accrued salary or wages of any officer, employee, or elected official of the United States or the District of Columbia, or any agency or instrumentality thereof, may be levied upon by serving a notice of levy on the employer (as defined in Section 3401(d)) of such officer, employee, or elected official. The report

said that the change in this section makes unnecessary any change from existing law in the definition of person in Section 6332(c) of the House bill. See U.S. Code Cong. & Adm. News, 1954, Vol. 3, p. 5225. The bill was adopted by Congress as changed by the Senate.

It is apparent that the Senate so amended the House bill in order to make clear its intent to subject the salary or wages of officers and employees of the United States to the levy provided in the Act. Further language of the Senate Report shows that if the provision relating to such salary or wages were not included, the definition of "person" in Section 6332(c) would have to be changed to include officers and employees of the United States. It is submitted that the definition of person is not sufficiently broad to include such officers and employees, and that they are now included only because of the express language pertaining thereto in Section 6331. It is further submitted that such definition of "person" also fails to include officers and employees of a state. There being no express provision in Section 6331 to bring accrued salaries of officers and employees of a state within the act, it is asserted that such accrued salaries are not subject to the levy so provided. If Congress had desired to include states, it could easily have done so in the same manner in which it provided for salaries of officers and employees of the United States. It did not so provide, there being nothing in the legislative history which tends to show otherwise. Consideration must be given to what Congress actually did, not to what an administrator thinks it intended to do.

The comments of the court below (R. 34), relative to *Smith* v. *Jackson*, 246 U.S. 388, tend to support the

position of this petitioner. It was therein noted that a federal disbursing officer has no right to set-off, against a federal employee's salary, for debts owing to the United States. The court then said: "Undoubtedly, Section 6331 was designed to alleviate this difficulty and to subject federal employees to the same collection procedures as are available against all other taxpayers, *including employees of the state.*" (R. 34.) (Italics supplied.) It is submitted that the above italicized words constitute a conclusion of the court; a conclusion with which we do not agree. It is further submitted that, just as the act was amended to include federal employees, so should it have been to expressly include state employees.

Congressional intent is determined as of the time of enactment and such determination should not be influenced by later developments or the hindsight of tax enforcement officials. If subsequent developments or circumstances make necessary a change in statutory law, such change should be brought about by legislation, not by a change in the interpretation of such law. This is a principal reason for the frequent meetings of Congress.

Such legislative history clearly reveals that when the pertinent sections were enacted, Congress had no thought of including states or officers or employees thereof. In fact, it was not until recent years that incomes of officers and employees of a state were even subjected to the federal income tax. *Helvering* v. *Gerhardt*, 304 U.S. 405, 82 L.ed. 1427 (1937); Section 3401, I.R.C., 1954 (formerly Sec. 1621, I.R.C., 1939, as amended in 1943). It is noted that in Sec. 3401 Congress expressly included "an officer, employee, or elect-

ed official of the United States, a State * * *," relative to those against whom withholding tax applied. It thereby evidenced its belief that federal and state employees, while not exempt, must be specifically included in an internal revenue act.

It is pertinent that the Court of Appeals, in the instant case, in requesting a supplemental brief, asked for "any data reflecting the intent to authorize the filing of liens and levying of distraint upon the accrued income of state employees." The very language of the court's order indicates that it wanted factors positively showing the intent to so authorize such levies. Instead of the positive, a negative approach was employed. Both the court below and the government, while failing to produce any data reflecting such intent, stated in effect that the legislative history does not reveal the existence of any negative intention. It is respectfully submitted that Congress in its original enactments concerning such levies did not include states; that throughout the years it did not change the language of such statutes; and that, in order to show by the legislative history of such statute that an intent to include states existed, factors of a positive nature must be in evidence. It is inadequate to blandly say that Congress must have intended to include states merely because throughout the years no intention to exclude them appears. Sight must not be lost of the fact that neither the state nor an officer or employee thereof was included in the language of the statute.

State Is Not Included In Term "Person," Except in Special Cases

The case at bar is not a proceeding against a taxpayer for the nonpayment of taxes, but rather is a proceeding to impose a penalty against one supposedly in possession of property of the taxpayer, for his failure to remit to the Department of Internal Revenue such property, as demanded by a Notice of Levy served upon him. It should be noted that the Notice of Levy (R. 19) served upon Edgar B. Sims, Auditor of the State of West Virginia, was addressed to the State of West Virginia, as the person holding property, moneys, etc., belonging to the taxpayer. Examining the language of the pertinent sections of the Internal Revenue Code of 1954, a crucial question arises as to whether the State is a "person" in possession of property or rights to property of the taxpayer within the meaning of Section 6332.

The definition of "person" lists what it intends to mean and include. This is evident not only in Section 6332(c) but also in Section 7701 of the Internal Revenue Code, wherein definitions are set out for terms used anywhere throughout Title 26 of the United States Code. It is obvious that the state is not included in either of these definitions. How, then, can a state be a person as contemplated by Section 6332? A state is *sui generis*, which is defined in Black's Law Dictionary, Third Edition, as, "of its own kind or class; i.e., the only *one* of its own kind; peculiar." It is separate and apart from any other entity and requires separate and distinct treatment. Consequently, if legislation intends to affect a state, such intent should be

set out in clear and unambiguous language. Certainly, in common usage, the term "person" does not include the sovereign state.

There are, however, certain exceptions to the foregoing proposition. While a state has sometimes been held to be included within the meaning of "person", an examination of the cases so holding readily reveals the reason therefor and the manner in which they are distinguishable from the case at bar. The respondent herein has argued to the contrary and has cited in support of its position *Georgia* v. *Evans*, 316 U.S. 159, 86 L.ed. 1346 (1942), *United States* v. *Graham*, 96 F. Supp. 318 (D.C. F. D. Cal. 1951), and *Ohio* v. *Helvering*, 292 U.S. 360, 78 L.ed. 1307 (1934).

In *Georgia* v. *Evans*, *supra*, the state was included within the meaning of "person". This, however, was an action brought under the Sherman Anti-trust Law, wherein the state as a person sought treble damages for a wrong committed in the purchase of asphalt. The court said that to hold otherwise would deny the state all means of redress when mulcted by a violator of the Sherman Law. Therein the court said that the word "person" does not necessarily include a state. This was stated in the following language:

> "Whether the word 'person' or 'corporation' includes a state or the United States depends upon the legislative environment."

In *United States* v. *Graham*, *supra*, it was held that a state was a "person" within the meaning of Section 3678(b) of the Internal Revenue Code of 1939 (now section 7403(b) of I.R.C. 1954). This section reads as follows:

> "All persons having liens upon or claiming any interest in the property or rights to property sought to be subjected as aforesaid shall be made parties to such proceedings and be brought into court."

This section is concerned with the parties in a proceeding to enforce a lien on property. That Congress did not mean to exclude the state from those who could be made a party to such proceeding is consonant with reason and the object there sought to be achieved—the adjudication of the rights of all claimants. But a decision that the state may be brought in as a party along with other claimants in a suit to enforce a lien against property does not establish that there was a congressional intent to include the state within the meaning of the term "person" wherever said term may appear in the Internal Revenue Code. As stated by the court in *Georgia* v. *Evans, supra,* the legislative environment must be examined.

In *Ohio* v. *Helvering, supra,* the state was held to be a "person" under a federal statute which imposed a tax upon "every person who sells * * * distilled spirits." Here the State of Ohio was engaged in the sale of alcoholic beverages through its stores, and was held to be conducting a nongovernmental proprietary function, thereby causing it to be embraced within the meaning of the word "person" as used in the statute. The court said:

> "* * * that the state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of the tax either as a 'person' * * *."

This case does not contend that the word "person" always includes a state, but says that whether it does

or not depends upon the connection in which the word is found.

The respondent cites these cases for the proposition that the word "person", when used in the Internal Revenue Code, includes the state. As pointed out above, this is true only in certain cases. In *McBride* v. *Board of Commissioners*, 44 F 17 (1890), and *United States* v. *Cooper Corporation*, 312 U.S. 600, 85 L.ed. 1071 (1941), the courts held that such term did not include the state. It is not contended that the two latter cases preclude a state from ever being considered a person, but it is asserted that the legislative environment of the statute and the circumstances under which the term "person" is used must be considered to properly determine such question. We are herein concerned not with a suit to enforce a lien against property, but rather with a proceeding to impose a personal penalty upon a public officer for an alleged violation. It is pertinent that a governmental rather than a proprietary function of the state is involved.

Penal Statute Should be Strictly Construed

Section 6332 of the Internal Revenue Code of 1954, under the provisions of which judgment was entered against this petitioner, is a penal statute and as such should be strictly construed. That it is penal in nature is clearly indicated by the language used in the title of subsection (b), "Penalty for violation." Ordinarily the word "penal" connotes a penalty imposed for a criminal offense whereby a person may be deprived of his liberty. This is extended, however, to apply to an act which imposes a penalty or creates a forfeiture as a punishment for the transgression of its provisions.

50 Am. Jur. 35, Statutes. The latter may be civil in nature and is illustrative of the penalty imposed upon this petitioner.

Penal statutes, as a rule, are not to be extended by construction, but must be limited to cases clearly within the language used. *United States* v. *Chemical Foundation*, 272 U.S. 1, 71 L.ed. 131 (1926). While this case differs from the instant case factually, it holds that a penal statute is not to be extended to cases not clearly within its terms or to those exceptional to its spirit and purpose. In the case at bar, the penalty provided is to be imposed upon any person in possession of property of the taxpayer who refuses to surrender it in accordance with the levy. This petitioner is not such person, and to hold that he is constitutes a deviation from the strict construction rule applicable to penal statutes.

The rule of strict construction applies not only to penal statutes generally, but applies also to tax statutes which are penal in nature. *Rodenbough* v. *United States* (C.C.A. 3rd), 25 F. 2d 13 (1928); Sutherland, Statutory Construction, 3rd Ed., Vol. 3, Sec. 5603. Here the petitioner has been subjected to a penal tax statute and, under the well-established law, is entitled to consideration in accordance with the foregoing strict construction rule. This is particularly so where a penal tax statute is involved and such an interpretation would result in a construction in favor of the government and against the individual. See *Gould* v. *Gould*, 245 U.S. 151, 62 L.ed. 211 (1917); *United States* v. *Merriam*, 263 U.S. 179, 68 L.ed. 240 (1923); and *Elliott* v. *East Penn. R.R. Co.*, 99 U.S. 573, 25 L.ed. 292 (1879).

It is recognized by the petitioner that the above strict construction rule must be reasonably applied and should not be used to defeat the obvious purpose of the act. Congress has enumerated those who are to be affected by the provisions of Sections 6331 and 6332 of the Internal Revenue Code of 1954. It has listed officers and employees of the federal government and District of Columbia; it has listed persons; and, within the latter, it has listed officers or employees of a corporation, member or employee of a partnership, an individual, trust, estate, association or company (Sec. 7701 I.R.C., 1954). Neither state nor officer or employee thereof is listed or mentioned anywhere in Sections 6331 or 6332. Under the universally accepted legal maxim, "expressio unius est exclusio alterius," officers or employees of a state, having been excluded from a covered list, should not be brought within the statute by construction or interpretation.

The court below has held that by the definition of the word "person" Section 6332 permits an action against an individual "in his own person and estate" who has held property subject to levy in a purely representative capacity. It then erroneously quoted from Section 6332(c) by saying it includes a person who as "officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation." (R. 36.) As actually defined in Section 6332(c), the term "person" includes "an officer or employee *of a corporation* or a member or employee *of a partnership*, who as *such* officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation." (Italics supplied.)

It is submitted that the manner in which Section 6332(c) was quoted by said court places quite a different meaning on the word "person" than is actually stated and intended. In the first place, this petitiioner is an officer of a state, not an officer of a corporation. Secondly, this petitioner did not hold property of the taxpayer subject to levy. Section 6332, being penal in nature, should be strictly construed so as to afford to the word "person" the meaning actually stated therein. This the court below did not do.

II

The Provisions of Sections 6331 and 6332 of the Internal Revenue Code of 1954 do Not Authorize the Direction of the Levy Provided Therein Against this Petitioner.

In the case at bar we are concerned only with the personal liability of the petitioner. The judgment of the Federal District Court, affirmed by the Court of Appeals, imposes a penalty in the nature of a fine, pursuant to the provisions of Section 6332(b) of the Internal Revenue Code of 1954. The pertinent portion of that section reads as follows:

> "Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the secretary or his delegate, shall be liable in his own person and estate to the United States * * *."

It is noted therein that the liability falls upon any person who fails or refuses to surrender, as required by subsection (a), any property or rights to property subject to levy. It therefore becomes necessary to

examine said subsection (a), the pertinent part of which is quoted as follows:

> "Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the secretary or his delegate, surrender such property or rights (or discharge such obligation) to the secretary * * *."

An examination of the above-quoted sections shows conclusively that the penalty provided in 6332(b) is predicated upon the requirements set out in Section 6332(a). The last quoted section uses the words "any person," it being contended by the government that those words necessarily include this petitioner. However, the words "any person" are qualified and limited to only those persons in possession of (or obligated with respect to) property or rights to property subject to levy. The attention of the Court is respectfully directed to the notice of levy involved in this case (R. 19). It is noted that such levy is directed to the State of West Virginia, as the person holding property, moneys, etc., belonging to the taxpayer. If the state is a person within the meaning of the statute, and we do not believe that it is, then the state would be subject to the penalty referred to herein. Certainly this petitioner, an individual, is not a person in possession of or obligated with respect to property or rights to property of the taxpayer. He cannot be included in the requirement set out in Section 6332(a) and cannot, therefore, be subject to the penalty provided in Section 6332(b). Edgar B. Sims as an individual was not and could not be in possession of or obligated with respect to the wages of the taxpayers involved herein. As an individual, he had no more possession of or con-

trol over the wages of the taxpayers employed by the State than any other individual private citizen of the State.

The respondent has argued and the Court of Appeals has stated, in relation to this case, that the state auditor is the officer obligated with respect to the salaries of state employees and that employees entitled to payment for their services may enforce their rights by mandamus against him. In support thereof the court below has cited *State* v. *Sims*, 55 S.E. 2d 505, 133 W. Va. 239 (1949); *State* v. *Sims*, 68 S.E. 2d 489, 136 W. Va. 789 (1952); and *State* v. *Sims*, 82 S.E. 2d 321, 140 W. Va. 64 (1954). An examination of these cases shows in each and every instance that the mandamus proceeding was instituted against Edgar B. Sims, Auditor of the State, to require him to honor a requisition to expend State moneys. In the instances where the writ was awarded, the judgment was against the Auditor of the State and not against Mr. Sims in his individual capacity. We know of no case wherein a writ was awarded against Mr. Sims in an individual capacity or wherein he became personally liable. Likewise, in the instant case, if liability exists, it must be against the auditor, not against this petitioner, as an individual.

In summary of this point, it is respectfully submitted that this petitioner, Edgar B. Sims, individually, did not have possession of or control over any moneys due the taxpayers employed by the State; that the said notice of levy was addressed and directed to the State of West Virginia, as the person in possession thereof; and that no authority exists in the statutes involved which would permit the direction of such levy against this petitioner.

Chapter 12, Article 3, Section 13a of The West Virginia Code (Michie, Sec. 1031(1)) Was Not Intended To Authorize The Withholding of Funds For The Satisfaction Of The Instant Levy.

The respondent has contended that the above West Virginia statute specifically authorizes the state auditor to honor the levy served in this case. The Court of Appeals has joined in this view (R. 36). It is respectfully urged that an examination of the above statute, hereinafter referred to as Section 1031(1), fails to support such contention. The pertinent language thereof reads as follows:

> *"Deductions by State Auditor from Salaries of State Officials and Employees to Pay Taxes and Purchase United States Government Bonds.* —The auditor of the State of West Virginia is authorized to deduct and withhold sums from the salaries or other compensation of state officials and employees, to purchase United States government bonds and other United States government obligations, or to pay taxes as may be required by an act or acts of the congress of the United States of America."

It is noted that the title to Section 1031(1) relates to deductions from wages and salaries of state officers and employees for two purposes, namely, (1) to pay taxes and (2) to purchase United States government bonds. The West Virginia Constitution (Article VI, Section 30) provides that an act shall embrace only that object expressed in its title. That object is the authorization to deduct only for the purposes expressed. It is necessary to consider the language of

the statute and the legislative environment in which it was enacted.

Sections 1031(1) was enacted in 1943, at a time when all efforts were directed to the war effort. Many measures were enacted, both by Congress and by state legislatures, for the purpose of enhancing the economy of the government. It was in this environment that the West Virginia Legislature adopted Section 1031(1).

One of the main purposes, as indicated by its title, was to readily enable state officers and employees to purchase government bonds. The other purpose was to permit deductions from wages for the payment of income taxes directly to the Government. These are commonly referred to as withholding taxes and relate only to taxes on income earned in state employment. This was a reflection of the action taken by Congress only shortly before. The West Virginia Legislature thereby, as indicated by the title and by the language used in the body of the act, expressed its desire to cooperate with the federal government. Such cooperation was, however, intended only in the fields covered by the statute. Expressly, the state desired to enhance the sale of government bonds among state employees, and, further, to provide a method whereby such employees may pay taxes on their incomes as they were earned. Neither the language nor the spirit of the statute intended to permit deductions from wages for any and all purposes. It was not thereby intended to permit deductions for the collection of delinquent taxes or for any purpose other than those expressly stated in the act. It is earnestly urged that the West Vir-

ginia Legislature of 1943 did not intended to include the instant levy when it enacted this section authorizing the auditor to deduct sums from the salaries and wages of officers and employees of the state.

III

A Public Officer is Not Personally Liable for the Consequences of an Act Performed Within the Scope of his Official Authority and in the Line of his Official Duty.

In this proceeding the primary consideration is the personal liability which has been imposed upon this petitioner under the provisions of Section 6332 of the Internal Revenue Code of 1954. The complaint was based upon the refusal of the petitioner to honor the levy referred to herein. As heretofore stated, such levy was addressed to the State of West Virginia and was served upon petitioner, Edgar B. Sims, Auditor. It was not served upon him as an individual. Likewise, when he refused to comply with the demand therein, he was not acting in his individual capacity, but as an officer of the state.

The widely accepted and general rule is that a public officer, whether judicial, quasi-judicial, or executive, is not personally liable for the consequences of an act performed within the scope of his official authority and in the line of his official duty. 43 Am. Jur. 85, Public Officers, Sec. 273; 67 C.J.S. 417, Officers, Sec. 125; *Moore Ice Cream Company v. Rose*, 289 U.S. 373, 77 L.ed. 1265 (1932). This was a case where the defendant, a collector of internal revenue, was under

an imperative duty, but it nonetheless exemplifies the freedom of a public officer from personal liability. He is equally protected from personal liability if he adopts a mistaken construction of an act of Congress or a state statute. 43 Am. Jur. 86, Public Officers, Sec. 274. This was cogently stated in *Cooper v. O'Connor*, 99 F. 2d 135 (1938), wherein the court said:

> "* * * if the act complained of was done within the scope of the officer's duties as defined by law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discretion, or because of an erroneous construction and application of the law. * * *"

Applying the language used by the court in the above-quoted case, it is earnestly urged that this petitioner should not be held personally liable for an act committed by him in his official capacity as auditor of the state. When the notices of levy were served upon the auditor, he entertained in his own mind an honest doubt as to the validity thereof in relation to the disbursement of state moneys. As a result of such doubt, he consulted the office of the attorney general, whereupon he was advised that such sections of the Internal Revenue Code did not apply to the state. Subsequently, the auditor refused to honor such levy. In so doing, he was not acting outside the scope of his authority. Furthermore, in a case such as this, there can be no question of malice or corruption.

There is a line of authority, according to *Cooper v. O'Connor, supra*, which holds that a public officer

wrongfully performing a ministerial duty may be personally liable for the consequences of his act. It is submitted, however, that in the instant case, the petitioner was required by law to exercise discretion. Under the provisions of Chapter 12, Article 3, Section 1, of the West Virginia Code, the auditor is required to exercise discretion in the disbursement of state funds. It was so held in *Robinson v. LaFollette*, 46 W. Va. 565, 33 S.E. 288 (1899); *Standard Oil Co. v. Fox*, 6 F. Supp. 494 (1934); and *State v. Sims*, 127 W. Va. 786, 34 S.E. 2d 585 (1945).

As evidence of the requirement to exercise discrecretion, the pertinent language of Chapter 12, Article 3, Section 1, of the West Virginia Code is quoted as follows:

> "Every person claiming to receive money from the treasury of the State shall apply to the auditor for a warrant for same. The auditor shall thereupon examine the claim, and the vouchers, certificates and evidence, if any, offered in support thereof, *and for so much thereof as he shall find to be justly due* from the State, *if payment thereof be authorized by law*, and if there be an appropriation not exhausted or expired out of which it is properly payable, he shall issue his warrant on the treasurer, specifying to whom and on what account the money mentioned therein is to be paid, and to what appropriation the same is to be charged. * * *" (Italics supplied).

It is noted that such statute specifically requires the auditor to determine the amount justly due from the state and if payment thereof is authorized by law. He is thereby under a duty to consider the legality of the

expenditure of any state moneys. For example, if a requisition is presented to the auditor which he believes to be an improper expenditure, he may refuse to issue his warrant. In such event, mandamus is available as a remedy to attempt to require him to issue the warrant. If the writ is awarded, then he issues the warrant and the state moneys are accordingly disbursed. In no case, though, has the auditor been required to personally pay such moneys. This course affords protection to the people by protecting their officers against vindictive and retaliatory damage suits, and thereby insures their fearless and effective administration of law. *Cooper v. O'Connor, supra.*

In the instant case the auditor, in the performance of his official duty, exercised the discretion as required by statute, and in so doing concluded that state moneys should not be disbursed in accordance with this respondent's demand. If the petitioner is to be personally accountable for acts performed in his official capacity and within the scope of his official authority, is there not a danger that he, or any public officer so situated, would be reluctant to exercise discretion as required of him by law? Would not the public then lose the protection of law as provided in West Virginia Code 12-3-1?

The court below, while agreeing with the legal proposition forwarded by *Cooper* v. *O'Connor, supra,* has held that such rule of law can be changed by an act of Congress. With this we have no quarrel. However, in all equity and justice, it is submitted that if such change is effected, the result of which would be to impose personal liability where it did not theretofore exist, such amendment should be enacted in clear and

unmistakable terms. It should not be effected by interpretation.

This review concerns only the personal liability of Edgar B. Sims. It is respectfully urged that when the act or omission complained of was committed, the petitioner was not only acting within the scope of his official authority, but he was exercising discretion as required of him by law. Under these circumstances, even if, as auditor, this petitioner was mistaken as to the law, he should not be held personally liable therefor.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX

26 U.S.C. 6321; Lien for taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. 6331. Levy and distraint

(a) Authority of Secretary or delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or re-

fusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property.—The term "levy" as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) Successive seizures.—Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

26 U.S.C. 6332. Surrender of property subject to levy

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty for violation.—Any person who fails or refuses to surrender as required by

subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) Person defined.—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

26 U.S.C. 7403. Action to enforce lien or to subject property to payment of tax

(a) Filing.—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) Parties.—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) Adjudication and decree. — The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

(d) Receivership.—In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary or his delegate during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

West Virginia Code, Chapter 12, Article 3, Section 13a:

Deductions by State Auditor from Salaries of State Officials and Employees to Pay Taxes and Purchase United States Government Bonds— The auditor of the State of West Virginia is authorized to deduct and withhold sums from the salaries or other compensation of state officials and employees, to purchase United States government bonds and other United States government obligations, or to pay taxes as may be required by an act or acts of the congress of the United States of America.

The auditor of the State of West Virginia shall, upon the written request or order of any state official or employee, deduct and withhold

sums from the salaries or compensation of state officials and employees to make voluntary purchases of United States government bonds or other United States government obligations for such officials or employees.

The auditor shall keep an account of the accumulated deductions of each state official and employee and shall issue receipts to state officials and employees for all sums deducted and withheld as herein provided. The sums, when deducted, shall be transferred by the auditor to a special fund in the state treasury, and, as soon as reasonably convenient, transmitted to the treasurer of the State of West Virginia, as an issuing agent of federal securities, or such other official or agent of the United States government designated by the secretary of the treasury of the United States of America, from time to time.

Should any official or employee leave the employ of the State at a time when there is not sufficient accumulation of deductions from his salary or compensation to purchase a United States government bond then the auditor shall either purchase United States government savings stamps in the amount of the accumulation or refund to the official or employee the accumulation as an erroneous payment into the special fund herein created.

The auditor shall be responsible for the delivery of United States government bonds or obligations purchased with the deductions from the salaries or compensation of state officials and employees only when the United States government bonds or obligations are presented to him by the official or agent of the United States government for delivery to the state officials or employees.

To promote efficiency and economy in making such deductions as provided herein, the auditor is authorized to promulgate rules and regulations and to designate the time for the presentment of the pay roll requsitions for state officials and employees and requisitions for other claims against the State: Provided, that all officials and employees shall be paid at least once every thirty-one days. All officials and employees of the State shall comply with the rules and regulations promulgated by the auditor under this section.

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No. 88

In the Supreme Court of the United States

October Term, 1958

EDGAR B. SIMS, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The oral opinion of the District Court (Pet. 11a-12a) is not reported. The opinion of the Court of Appeals (Pet. 1a-11a) is reported at 252 F. 2d 434.

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1958. A petition for rehearing was denied on March 13, 1958. The petition for certiorari was filed June 7, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether the auditor of the State of West Virginia is personally liable under Section 6332 of the Internal Revenue Code of 1954 for his refusal to surrender accrued wages of delinquent federal income taxpayers pursuant to notice of levy served on him under Section 6331 of the Code.

STATUTES INVOLVED

Sections 6321, 6331(a), 6332(a), (b) and (c), and 6334(a) and (c) of the Internal Revenue Code of 1954; and Art. VI, Sec. 35 of the Constitution of West Virginia are pertinent and portions of them are printed in the Appendix, *infra*, pp. 9-12.

STATEMENT

The facts were all stipulated (R. 20a-24a) and may be briefly summarized as follows:

Three employees of the State of West Virginia were indebted to the United States for income tax deficiencies upon earnings in endeavors apart from their state employment. The Commissioner of Internal Revenue made an assessment of tax deficiencies as to each and forwarded the assessments to the Collector of Internal Revenue at Parkersburg, West Virginia, for collection. The Collector demanded payment from each of them and, the deficiencies remaining unpaid for more than ten days, served on Edgar B. Sims, then auditor of West Virginia, notices of levy upon their accrued salaries, pursuant to Section 6331 of the Internal Revenue Code of 1954. (R. 20a-22a, 27a.) When the levies were made, the three

employees had accrued take-home pay totaling $519.71 (R. 23a).

On advice of the office of the Attorney General of West Virginia, the state auditor refused to honor the notices of levy and issued to each of the employees a warrant for the payment of his salary (R. 22a-23a; Pet. 2a).

Thereafter the Government brought suit to recover a sum equal to the value of the property not surrendered (R. 1a-12a). The suit originally was against the state auditor, individually and in his official capacity (R. 1a). On defendant's motion (R. 13a-14a), the action against him in his official capacity was dismissed (R. 15a-16a).

The District Court entered judgment against Sims in his individual capacity in the amount of $519.71 plus interest (R. 25a-26a). The judgment was affirmed on appeal (Pet. 1a-11a).

ARGUMENT

The decision below is correct on the basis of established principles of law. The conflicts alleged by petitioner (Pet. 15-18) are non-existent. Accordingly, the case does not present a question requiring review by this Court.

1. The case involves enforcement of the provisions of the Internal Revenue Code of 1954 for the collection of income taxes. Section 6321, Appendix *infra*, p. 9, establishes a lien for unpaid taxes "upon all property and rights to property" (except such property as is exempt under Section 6334). Section 6334, Appendix, *infra*, p. 11, enumerates specific exemp-

tions from levy and declares that, notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than those specifically enumerated. Section 6332(a), Appendix, *infra*, p. 10, requires "Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made" to "surrender such property or rights (or discharge such obligation)" upon demand. And Section 6332(b), Appendix, *infra*, p. 10, provides that "Any person who fails or refuses to surrender" such property upon demand "shall be liable in his own person and estate to the United States" in a sum equal to the value of the property plus costs and interest.

By its language, Section 6332(b) is applicable to petitioner, who, having been served with a notice of levy pursuant to Section 6331, failed to surrender accrued salary belonging to delinquent federal taxpayers. As the court below showed (Pet. 8a-9a), petitioner was the "person" in possession of and obligated with respect to the accrued salary upon which levy had been made. The lien established by Section 6321 and the levy authorized by Section 6331, Appendix, *infra*, p. 9, upon "all property and rights to property" applies to accrued salary. *United States* v. *Long Island Drug Co.*, 115 F. 2d 983 (C. A. 2d). As this Court has stated, "stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank* v. *United States*, 326 U. S. 265, 267.

The petitioner had possession of the accrued salary

and the fact that he acted only as a state official is immaterial. State sovereignty is not involved, it being well settled that a state officer, employee or agent can be required to collect federal taxes from private individuals and may be held individually liable for his failure to do so. *Allen* v. *Regents*, 304 U. S. 439, rehearing denied, 304 U.S. 590; *South Carolina* v. *United States*, 199 U. S. 437. And it is equally well settled that the word "person" in a federal statute applies to a state or state official unless a contrary Congressional intent is indicated. *Georgia* v. *Evans*, 316 U. S. 159; *Ohio* v. *Helvering*, 292 U. S. 360; *Wilmette Park Dist.* v. *Campbell*, 338 U. S. 411. Here there is no contrary intent and, as the court below noted (Pet. 8a-9a), the very definition of "person" in Section 6332 imposes liability on an individual "in his own person and estate" for a failure with respect to property held in a representative capacity.

There is no constitutional requirement that the salaries of state employees be treated differently from the salaries of others. *Helvering* v. *Gerhardt*, 304 U. S. 405; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466. Thus, two courts have squarely held that money owed by a state to a delinquent taxpayer is subject to the federal tax lien. *United States* v. *Graham*, 96 F. Supp. 318 (S. D. Cal.), affirmed *per curiam sub nom. California* v. *United States*, 195 F. 2d 530 (C. A. 9th), certiorari denied, 344 U. S. 831 (rent); *United States* v. *Newhard*, 128 F. Supp. 805 (W. D. Pa.) (accrued wages). As a matter of fact, West Virginia, the State involved here, has by constitutional amendment authorized garnishment suits against it.

Constitution of West Virginia, Article VI, Section 35, Appendix, *infra*, p. 12. Federal levy is analogous to garnishment and the United States certainly has the remedies enjoyed by one of her citizens, although it is, of course, not required to use state procedures. *United States* v. *Bess*, Nos. 395, 410, Oct. Term, 1957, decided June 9, 1958.

Petitioner has nevertheless contended that, as a matter of statutory construction, Sections 6331 and 6332 do not apply to the wages of state employees. But the decision below fully and conclusively refutes that contention. Indeed, as the court below noted (Pet. 5a-6a), in 1950, in amending Section 6331 to authorize levy upon the wages of *federal* employees (as to which *Smith* v. *Jackson*, 246 U. S. 388, had been a stumbling block, see Pet. 6a-7a), Congress legislated with knowledge and approval of the practice of the Internal Revenue Service of applying the existing statutes to the wages of *state* employees by levy against state officials holding money due delinquent federal taxpayers.

2. The alleged conflicts are non-existent. *United States* v. *Railroad Co.*, 17 Wall. 322, is not in point; it held only that a municipal corporation, as a portion of the sovereign power of a state, is not subject to federal tax. *Crooks* v. *Harrelson*, 282 U. S. 55, involving the federal estate tax, is relied upon as requiring acceptance of the literal meaning of the word "person" in Section 6332 even though the result be absurd. But the word "person" in Section 6332, both literally and otherwise, includes a state official. Moreover, the applicable rule, as already shown (*supra*, p.

5), is that the word "person" is a federal statute includes a state or state official unless a contrary legislative intent is reflected. *Cooper* v. *O'Connor*, 99 F. 2d 135 (C. A. D. C.), certiorari denied, 305 U. S. 643, rehearing denied, 305 U. S. 673, and 307 U.S. 651, cited as in "direct" conflict with the decision below (Pet. 18), was a suit for malicious prosecution against officers and employees of the United States in their individual capacities. Here we are concerned with the personal liability of an agent of a state to the United States. It is well settled that the agent of a sovereign can properly claim immunity from personal liability only if the relief requested is against the sovereign and if the sovereign is immune from suit. *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 686-688. Here there is no immunity for two reasons; the State is not immune from suit by the United States (*United States* v. *Texas*, 143 U. S. 621; *Monaco* v. *Mississippi*, 292 U. S. 313, 329) and the relief requested is not against the state. As already noted (*supra*, p. 5), this Court has held that the fact that individuals are acting as agents of a state does not relieve them from personal liability for the collection or payment of a federal tax.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys.

JULY, 1958

APPENDIX

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C., Supp. V, 6321.)

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes

a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

* * * *

(26 U. S. C., Supp. V, 6331.)

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for Violation.*—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) *Person Defined.*—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or em-

ployee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

(26 U. S. C., Supp. V, 6332.)

SEC. 6334. PROPERTY EXEMPT FROM LEVY.

(a) *Enumeration.*—There shall be exempt from levy—

(1) *Wearing Apparel and School Books.*—Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) *Fuel, Provisions, Furniture, and Personal Effects.*—If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $500 in value;

(3) *Books and Tools of a Trade, Business, or Profession.*—So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $250 in value.

* * * *

(c) *No Other Property Exempt.*—Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

(26 U. S. C., Supp. V, 6334.)

Constitution of West Virginia:

ARTICLE VI

* * * *

Section 35. The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee. (House Joint Resolution No. 3, Acts 1935, p. 662; 1935, c. 23. Ratified.)

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 88

EDGAR B. SIMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The oral opinion of the District Court (R. 25–26) is not reported. The opinion of the Court of Appeals (R. 28–37) is reported at 252 F. 2d 434.

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1958 (R. 37–38). The petition for rehearing (R. 38–40) was denied on March 13, 1958 (R. 40). The petition for certiorari was filed on June 7, 1958, and was granted on October 13, 1958 (R. 41). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether a state official is personally liable for his refusal, after service on him of notice of levy and demand, to surrender accrued wages owed by the state to delinquent federal income taxpayers.

STATUTE INVOLVED

The pertinent portions of Section 6321, 6331 and 6332 of the Internal Revenue Code of 1954 are as follows:

> SEC. 6321. LIEN FOR TAXES.
>
> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.
>
> (26 U.S.C., Supp. V, 6321.)
>
> SEC. 6331. LEVY AND DISTRAINT.
>
> (a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued

salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

* * * * *

(26 U.S.C., Supp. V, 6331.)

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for Violation.*—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal

to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) *Person Defined.*—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

(26 U.S.C., Supp. V, 6332.)

Also involved are Article I, Section 8 and Article VI, Clause 2 of the Constitution, Sections 6334 and 7403 of the Internal Revenue Code of 1954, and Section 301.6331–1 of the Treasury Regulations (1954), the pertinent portions of which are printed in the Appendix A, *infra*, pp. 41–43.

STATEMENT

Suit was instituted by the United States against Edgar B. Sims, individually and as State Auditor of the State of West Virginia, for judgment, pursuant to Section 6332 of the Internal Revenue Code of 1954 (*supra*, pp. 3–4), for failure to honor federal liens and levies on the accrued wages of certain state employees for unpaid federal income taxes owed by such employees (R. 1–9). A motion to dismiss was denied by the District Court except to the extent of dismissing the action against the petitioner in his official capacity (R. 11). He thereupon answered the complaint denying any liability (R. 13–14). Judgment

for the United States was entered in the amount of $519.71 plus interest (R. 18) and the judgment was affirmed on appeal (R. 37–38).

The facts were stipulated (R. 14–17) and may be stated as follows:

Three employees of the State of West Virginia—Henry Hart, Alvin S. Alexander and Kathleen Wheeler—were indebted to the United States for unpaid income tax deficiencies[1] (R. 14–15). Henry Hart owned $1,562.61 in income taxes for the years 1946, 1950 and 1951 (R. 14); Alvin S. Alexander owed $228.64 in income taxes for 1953 (R. 15); and Kathleen Wheeler owed $84.56 in income taxes for 1953 (R. 15).

Assessments of the income tax deficiencies were made by the Commissioner of Internal Revenue and forwarded to the Director of Internal Revenue at Parkersburg, West Virginia, for collection. The Director demanded payment from each taxpayer. After ten days had elapsed and the taxes were not paid, the Director levied upon the salaries due to each taxpayer from the State of West Virginia. The levies were made by notices of levy addressed either

[1] Although the complaint also sought judgment in respect of the unpaid taxes of two other state employees—Elbert M. Henderson, Sr., and Willie R. Childers—the stipulation of the parties (R. 17) intentionally omitted any reference to those claims because the petitioner was unable to locate the relevant records of those persons' wage payments.

The record does not specifically so show, but the tax deficiencies were apparently chiefly on income other than that received from the State, since the taxpayers' salaries from the State were subject to the withholding tax. (See Br. 10.)

to the State of West Virginia or to the petitioner and served upon the petitioner (R. 14–16).

These notices of levy were given upon established forms which specify the exact amounts due from the taxpayer, give notice of the lien of the United States, make a levy and seizure of property of the taxpayer in the possession of the person notified, and demand payment. The form, 668–A, reads in relevant part as follows (R. 19–20):[2]

> You are further notified that demand has been made upon the taxpayer for the amount set forth herein, and that such amount is still due, owing, and unpaid from this taxpayer, and that the lien provided for by Section 6321, Internal Revenue Code of 1954, now exists upon all property or rights to property belonging to the aforesaid taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability.

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[2] This record reference is to the notice served on the petitioner with respect to Henry Hart, and is representative of all the notices. The back of the form, not set forth in the record, prints the text of Sections 6321, 6322, 6331, 6332, 6333 and 6334 of the Internal Revenue Code of 1954.

Notices of levy were first served on the petitioner, the state auditor, on October 27, 1955, with regard to Wheeler and Alexander and on December 14, 1955, with regard to Henry Hart (R. 15–16). As of those dates, the three taxpayers had accrued "take-home" pay due from the state in the total amount of $519.71 (R. 16, pars, 6, 8, 10).

The notices of levy were not honored and second notices of lien and levy, incorporating final demands for payment, were served upon the petitioner on November 7, 1955, with regard to Alexander and Wheeler, and on December 16, with regard to Hart (R. 16–17).[3]

Notwithstanding these successive notices of levy, the petitioner paid over to the employees their accrued take-home pay (R. 16). He states (Br. 25) that in refusing to honor the levies he acted upon the advice of the office of the Attorney General of West Virginia.

SUMMARY OF ARGUMENT

In contending that the courts below erred in holding that he is personally liable for his refusal to honor the federal income tax levies, the petitioner relies on his status as a state officer and asks this Court to hold that states are excluded from the application of the

[3] This notice is not set forth in the record, but final demand is a standard form (Form 668C) which advises of the prior notice of lien and levy and calls attention to Section 6332(b) of the Code imposing personal liability upon any person in possession of the property or rights to property subject to levy upon which a levy has been made who fails or refuses to surrender the property. A copy of this form is attached to this brief as Appendix B, *infra*, p. 44.

pertinent statutes because they are not "persons" within the meaning of the Internal Revenue Code and that in any event the petitioner was not personally liable for his official acts. In brief, the petitioner argues that Congress limited the federal power to collect taxes insofar as state employees are concerned. The petitioner makes no express argument based on federal-state relations or Constitutional immunity.

1. The basic statutory provisions are Sections 6321 and 6331(a) of the Internal Revenue Code of 1954, *supra*, pp. 2–3, which provide for a lien and levy upon "all property and rights to property" of a delinquent taxpayer, with exceptions which do not include salaries and wages either of state employees or of others. These lien and levy provisions are general in application and make exemption dependent upon the type of property involved rather than on who has possession of it. Since the salaries and wages of state employees are subject to the imposition and collection of federal taxes, just as any other salaries and wages, and no burden on the states is involved, these lien and levy provisions necessarily apply to the salaries and wages of state employees, as the pertinent Treasury Regulations specifically provide. Indeed, to interpret them otherwise would be to assume that Congress, despite its paramount power to lay and collect taxes, has exempted from levy, in aid of the collection of federal taxes, property which in the majority of states is even subject to being reached for the payment of debts owed by state employees to private creditors.

The pertinent provisions for enforcement of the federal tax liens and levies, contained in Section 6332

of the Code, apply to "[a]ny person" in possession of property or rights to property subject to levy, require the surrender of such property pursuant to levy, and impose personal liability on "[a]ny" such person who fails or refuses to honor a levy upon such property, in a sum equal to the value of the property but not to exceed the amount of taxes which are the subject of the levy. The state of West Virginia as principal is the "person" who had possession of the accrued salaries of the three delinquent taxpayers upon which levies were made, the petitioner is the "person" who was obligated to surrender such accrued salaries pursuant to the levies, and the "person" who refused to do so and who has incurred personal liability therefor. His only defense is that he was acting as an officer of the state, rather than as an individual, and that the provisions of Section 6332 accordingly do not apply to him.

But no constitutional immunity is involved and Section 6332 makes no distinction between a state and any other person holding leviable property. Contrary to the petitioner's argument, no purpose to exclude a state can be implied from the fact it is not expressly included in the definition. The petitioner is arguing for a rule of statutory construction which would *exclude* states by implication, whereas the rule is already well settled that states are *included* in the general language of federal statutes, and particularly in the word "person", unless a contrary intent is indicated. No contrary intent exists or can be assumed in respect of revenue measures, as decisions of this Court attest, and that is equally true where, as here, the

word "person" is defined with reference to corporations and partnerships without mentioning states. Here, no less than in other contexts, there is no reason to exempt a state or state officer "from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States* v. *California,* 297 U.S. 175, 186; *California* v. *Taylor,* 353 U.S. 553, 562–563.

2. Since the salaries owed to the delinquent taxpayers by the state were subject to levy and since it is not disputed that the petitioner is the state official authorized to determine whether the payments were to be made to the employees or paid over to the Director of Internal Revenue pursuant to the demand, the statutory scheme imposes personal liability on the petitioner for disregarding the notice served on him. Thus, Section 6332(b) of the Internal Revenue Code makes the person who refuses to surrender property properly demanded from him "liable in his own person and estate." And Section 6332(c) makes it clear that this liability is to be imposed on a person acting as an agent since it specifically points to officers or employees of corporations. Whether the principal, here the state itself, would be liable depends upon whether the agent was acting within his authority, but the liability of the officer who actually disregarded the demand is clear.

In the final analysis, the petitioner's complaint is simply that he has been subjected to personal liability while acting as a state officer. But that this in itself

is not enough to avoid liability is well established. *South Carolina* v. *United States*, 199 U.S. 437; *Allen* v. *Regents*, 304 U.S. 439. Where there is no burden on the states in performing their governmental functions, there is no real problem in federal-state relations.

Moreover, the petitioner's violation of federal law was needless; he was a mere stakeholder who could have held the warrants for payment of the accrued salaries of the delinquent taxpayers and awaited a judicial determination of the conflicting claims of the United States and the employees. Instead he chose to refuse to honor the federal levies with notice that to do so would result in the imposition of personal liability.

ARGUMENT

This case involves the application of the provisions of the federal internal revenue laws with respect to the collection of taxes. The delinquent taxpayers are three employees of the State of West Virginia. The federal tax authorities sought to collect their unpaid federal income taxes by levying upon their accrued state salaries through notices of lien and levy served upon the petitioner, the state auditor. That he was the proper person to be served with the notices is not disputed.[4] He nevertheless refused to honor the notices of levy and, instead, defeated them by paying out the salaries to the delinquent employees. Called to account for his action by suit filed against him for

[4] The delinquent state employees' salaries were payable by warrants issued the state auditor. He was charged with the duty of issuing such warrants and, if he did not perform that

judgment in the amount of the taxes covered by the notices of levy, he seeks to avoid the personal liability therefor imposed upon him by Section 6332(b) of the Internal Revenue Code of 1954, *supra*, p. 3, by arguing that the pertinent statutory provisions are inapplicable to a state and that he cannot be held personally liable for an act performed within the scope of his official authority as a state official. He makes no contention expressly based on Constitutional immunity considerations, but at points his argument contains Constitutional overtones. Our argument will therefore include a showing that no burden on the state or Constitutional immunity is involved and no problem of federal-state relations is posed.

I

THE ACCRUED SALARIES OF STATE EMPLOYEES MAY BE LEVIED UPON AND COLLECTED TO SATISFY DELINQUENT FEDERAL TAXES

Apart from the Constitutional issue, discussed in Point C below, there are two questions of statutory interpretation. The first, dealt with in Point A, is whether the state's obligation to its employees is subject to the federal lien which attaches to the property

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duty, its performance could be enforced by a writ of mandamus. *Board* v. *Sims*, 136 W. Va. 789. Under the laws of West Virginia the state auditor is also the person required to withhold federal taxes from the salaries of state employees and to pay all taxes required by federal law. 1 West Virginia Code of 1955, Section 1031 (1). Had a judgment creditor wished to garnishee the wages of these employees, the execution would have had to be issued against the state auditor. 2 West Virginia Code of 1955, Section 3834(18).

rights of delinquent taxpayers. The second, discussed in Point B, is whether the provisions of Sections 6332 of the Internal Revenue Code, imposing a duty to make payment to the United States on demand, applies to the states.

A. THE STATUTORY PROVISIONS FOR LIENS AND LEVIES FOR UNPAID TAXES APPLY TO THE ACCRUED SALARIES OF STATE EMPLOYEES

Section 6321 of the 1954 Code, *supra,* p. 2, provides in comprehensive terms that the United States shall have a lien for the amount of any unpaid taxes upon "all property and rights to property" of a taxpayer. To enforce the lien, when any tax is unpaid for ten days after notice and demand, Section 6331(a) authorizes the tax authorities to collect the tax by "levy upon all property and rights to property" belonging to the taxpayer, except such property as is exempt under Section 6334 (Appendix A, *infra,* pp. 41–42) and the latter section states in subsection (c) that "no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)." The exemptions do not include salaries or wages which are, of course, "property" or "rights to property" subject to levy. *Glass City Bank* v. *United States,* 326 U.S. 265, 268; 9 Mertens, *Law of Federal Income Taxation* (Rev.), Sec. 49.205. West Virginia law itself so holds. See *Roberts & McInnis* v. *Emery's Motor Coach Lines* (W. Va. Cir. Ct.), decided September 16, 1950, 50–2 U.S.T.C. par. 9455.

There is no suggestion in the statute that any exemption was intended because the salaries or wages are due to an employee from a state rather than from

a private employer. These lien and levy provisions originated in the Act of July 13, 1866, c. 184, 14 Stat. 98, 107,[5] and are basic to the entire scheme of collection of federal taxes. It is clear from their history that they are all-inclusive and that there are no exceptions or exemptions whatever, save those specified in the statutes. *Fink* v. *O'Neil,* 106 U.S. 272; *United States* v. *Heffron,* 158 F. 2d 657 (C.A. 9), certiorari denied, 331 U.S. 831. Section 6321 imposes "a sweeping lien 'upon all property or rights to property' ". *Blacklock* v. *United States,* 208 U.S. 75, 85. The Court of Appeals for the District of Columbia Circuit has stated that "The language unquestionably encompasses money belonging to a taxpayer, in whatever hands it may be." *Welsh* v. *United States,* 220 F. 2d 200, 202. The Tenth Circuit has said that "The statute covering collection of taxes is broad and comprehensive and Congress intended to subject all of

[5] This Act provided:

> * * * And if any person, bank, association, company, or corporation, liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person, bank, association, company, or corporation; and the collector, after demand, may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property belonging to such person, bank, association, company, or corporation, on which the said lien exists, for the payment of the sum due as aforesaid, with interest and penalty for non-payment, and also of such further sum as shall be sufficient for the fees, costs and expenses of such levy. * * *

a taxpayer's property, except that specifically exempt from the payment of taxes." *Citizens State Bank of Barstow, Tex.* v. *Vidal,* 114 F. 2d 380, 382. A West Virginia state judge, deciding that the federal tax lien is superior to a garnishee summons (before the decision of this Court in *United States* v. *Liverpool & London Ins. Co.,* 348 U.S. 215) stated that "The federal statute could hardly have used more inclusive terms." *Roberts & McInnis* v. *Emery's Motor Coach Lines* (W. Va. Cir. Ct., decided Sept. 16, 1950, 50-2 U.S.T.C. par. 9455). This Court has itself noted the sweep of the language. "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank* v. *United States,* 326 U.S. 265, 267.

Although there are no reported cases dealing with the attachment of federal tax liens to a state's obligation to pay salaries, in comparable situations where a state owes debts or holds property for an individual it has been held that the right, or property, is subject to the federal lien. *Welsh* v. *United States,* 220 F. 2d 200 (C.A.D.C.); *United States* v. *Graham,* 96 F. Supp. 318 (S.D. Cal.), affirmed *per curiam sub nom. California* v. *United States,* 195 F. 2d 530 (C.A. 9), certiorari denied, 344 U.S. 831; *United States* v. *Newhard,* 128 F. Supp. 805 (W.D. Pa.). In *United States* v. *City of New York,* 82 F. 2d 242 (C.A. 2), although it was held that the property need not be surrendered to the United States because it was not in "possession" of the state, the court also declared that, had it been held by the state, it would have been subject to the lien.

The present Treasury Regulation, Sec. 301.6331–1 (a)(4), Appendix A, *infra*, p. 43, specifically provides:

> Accrued salaries, wages, or other compensation of any officer, employee, or elected or appointed official of a State or Territory, or of any agency, instrumentality, or political subdivision thereof, are also subject to levy to enforce collection of any Federal tax.

It is of course indisputable that Treasury Regulations within the framework of the Code have the force of law, *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, and that in interpreting the Code such regulations are given great weight. *Brewster* v. *Gage*, 280 U.S. 327; *Commissioner* v. *Wheeler*, 324 U.S. 542.

Petitioner completely ignores the language of Sections 6331(a) and 6334(c), but nevertheless implies (Br. 12) that the court below had doubts as to whether Congress intended to authorize levies on the accrued salaries of State employees. The court below entered an order requesting the parties to file supplemental briefs setting forth the legislative history of the pertinent sections of the Code and any available information as to the administrative practice in respect of an intent to authorize the filing of liens and notices of levy upon the accrued income of state employees (R. 27), but that was because petitioner made two arguments in the court below which were later answered so completely in the court's opinion (R. 31–34) that they have not been renewed in this Court.

One of these arguments was to the effect that Congress should be deemed to have acquiesced in a long-standing administrative interpretation of the statute as not authorizing levy upon the salaries of State employees. But, as the opinion below shows (R. 31–33), there had been no authoritative ruling to that effect which had been followed administratively or of which Congress was aware; it was only the exact opposite administrative interpretation which Congress could have ratified, for that was the only administrative interpretation of which it had knowledge.[6]

The other argument made below but not renewed here, except impliedly (see Br. 10–11), was that the express authorization in Section 6331(a) for levy upon the accrued salaries of employees of the federal government and the omission of reference to state employees indicates an intent to withhold authorization with respect to the latter. But, as the court

[6] The alleged interpretation of the statute holding that accrued state salaries could not be distrained consisted of a single Income Tax Unit Ruling (I.T. 2405, VII–1 Cum. Bull. 72) issued in 1928 with respect to reaching accrued salary in the possession of a city treasurer. The ruling was that the funds could not be reached. However, this was an isolated ruling not called to the attention of Congress and not followed by the Internal Revenue Service itself, as the court below pointed out (R. 32–33). It is well established that such rulings are not binding on the government. See *Helvering* v. *New York Trust Co.*, 292 U.S. 455, 468; *United States* v. *Higginson*, 238 F. 2d 439, 446 (C.A. 1). And it is far more likely that Congress had the present interpretation of the government in mind, than the single out-of-date and unauthoritative ruling cited above. Moreover, the ruling was issued at the time when it was thought that salaries of state employees were immune from taxation. See 9 Mertens, *Law of Federal Income Taxation* (Rev.), Sec. 49.205.

below noted (R. 34), the legislative history of Section 6331 does not reveal any such negative intent. The specific reference in Section 6331 to levy upon federal employees' salaries has a more likely explanation in a problem peculiar to the federal government, explained by the court below (R. 34), which made the provision regarding levy upon federal employees' salaries necessary in order to subject federal employees to the same collection procedures available against all other taxpayers, including state employees.[1]

In view of the prevelant state practice which subjects funds owed to state employees to attachment by creditors generally, it would be strange to interpret the federal law authorizing levy upon "all" property of a delinquent taxpayer (Section 6331(a), *supra*, p. 2) so as not to permit the use of the federal collection procedures in a situation where the state procedures would be available to the United States as well as other creditors. It is well established that the United States may, though it is not required to, use state remedies for the collection of debts owing to it, including delinquent taxes. *United States* v. *Bess*, 357 U.S. 51; *Blacklock* v. *United States*, 208 U.S. 75; *United States* v. *Manufacturers*

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[1] Treating a tax levy on a federal salary as a setoff, the Comptroller General had ruled that federal administrative officials had no authority to withhold salaries by reason of a levy. 26 Comp. Gen. 907, 912.

Trust Co., 198 F. 2d 366 (C.A. 2).[8] However, a levy on the property pursuant to Section 6331(a) is the method specifically provided by Congress for the collection of taxes and there appears no reason of policy for implying an exception in the case of the collection out of salaries due to state employees, when the states permit debts owed to private creditors to be collected out of such salaries. By and large the old policy that the salaries of public officers and employees were not subject to garnishment has been adandoned, either wholly or in part, by statutes enacted by thirty-two of the states, including West Virginia.[9] And the state courts have held that the

[8] In the *Manufacturers Trust Co.* case the court stated that "However, the remedy of the government to enforce collection of taxes by the summary administrative method of distraint is not so limited in its effect and is a special privilege it has which is analogous to, but in addition to, garnishment and other remedies of an ordinary creditor."

[9] In the years given after the section number, the following 25 states have completely abandoned the old policy and provided that the state and all its subdivisions shall be subject to garnishment of the salaries of their employees:

Arizona, Revised Statutes (1956) 12–1601 (1929);
Arkansas, Statutes (1947) 31–519 (1945);
Connecticut, General Statutes (1949) 8102(c)(d)(e) (1939);
Delaware, Code Annotated (1953) 10:3503 (1942);
Kansas, General Statutes (1949) 60–962 (1919);
Kentucky, Revised Statutes (1958) 427.130 (1942);
Michigan, Statutes Annotated (1938) 27.1900 (1919);
Mississippi, Code (1942) 2789 (1936);
Missouri, Annotated Statutes (1949) 525.310 (1943);
Montana, Revised Code (1947) 93–4341 (1901);
Nebraska, Revised Statutes (1943) 25–1012 (1925);
Nevada, Revised Statutes (1957) 281.130 (1883);
New Jersey, Statutes Annotated 2A; 17–53, 54 (1915);

policy that debtors should pay their debts is a better

New Mexico, Statutes Annotated (1953) 26–2–28 (1919);
New York, Civil Practice Act, Sec. 684 (1910);
North Dakota, Revised Code (1943) 32–0901 0928 (1929);
Ohio, Revised Code Annotated (1953) 115.46, 2715:12 (1943);
Oklahoma, Statutes Annotated 12–1192 (1925);
Oregon, Revised Statutes (1953) 23.190 (1909);
South Dakota, Code (1952 Supp.) 37.2801 (1939);
Tennessee, Code Annotated (1955) 26–518 (1921, 1939);
Utah, Code (1953) 78–27–15 (1905);
Washington, Revised Code (1951), 7.32.060 (1854);
West Virginia, Constitution, Article VI, Sec. 35 (1935); 2 West Virginia Code of 1955, Sec. 3834 (15) (1939);
Wisconsin, Statutes Annotated (1957) 267.22 (except first-class cities) (1915).

Two more states have abandoned the policy except for elective officials (Idaho Code (1947) 11–202 (1939); Virginia Code (1950) 8–449.1, 2 (1900)); and two except as to those whose salaries are fixed by the constitution (California, Code of Civil Procedure, Sec. 710 (1903); Colorado, Revised Statutes (1953) 77–12–1, 2, and 3 (1927)). One state has abandoned the policy except for county officials (New Hampshire Revised Statutes Annotated (1950) 512:9 (1939); see *Frame* v. *Brown*, 98 N.H. 413), while two states have retained the immunity for all state officers and employees, but not for county, district and municipal officers and employees (Alabama Code (1940) 7–1032–6 (1923) and see *Shepherd* v. *Jones*, 228 Ala. 307; Minnesota Statutes Annotated (1945), 571.45, 46 (including state highway department employees)). Of the remaining 16 states, three have abandoned the old policy as it affects more important interests, e.g., divorce court orders and collection of state taxes (Florida Statutes (1943) 65.13, and see *Duval County* v. *The Charleston Lumber Co.*, 45 Fla. 256; Pennsylvania, by court decision, *Commonwealth* v. *Caughey*, 76 D. & C. 305, and see same rule in District of Columbia, *Montgomery* v. *Montgomery*, 153 F. 2d 634 (C.A. D.C.); North Carolina General Statutes (1947) 105.385(e); Pennsylvania, Purdon's Pt. St. Ann., 72.5685, and see *United States* v. *Newhard*, 128 F. Supp. 805 (W.D. Pa.)).

policy and just as applicable to public officers and employees and to their employer as to any other employees and their employers.[10] This Court adopted the same view in *Federal Housing Administration* v. *Burr*, 309 U.S. 242, where the Court allowed garnishment of salaries of employees of a federal agency which Congress had authorized to sue and be sued.

B. THE STATE OF WEST VIRGINIA, AS PRINCIPAL, WAS A "PERSON IN POSSESSION OF (OR OBLIGATED WITH RESPECT TO) PROPERTY OR RIGHTS TO PROPERTY SUBJECT TO LEVY" UNDER SECTION 6332 OF THE INTERNAL REVENUE CODE AND WAS THEREFORE REQUIRED TO SURRENDER THE ACCRUED WAGES ON DEMAND

Having provided in Section 6321 for a lien and in Section 6331(a) for levy upon all property and rights to property of a taxpayer for unpaid taxes, so comprehensively as to include the salaries of state employees, in Section 6332 of the Code (*supra*, pp. 3–4) Congress provided for enforcement of the levies. Subsection (a) of that Section provides that—

> *Any person* in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, * * * . [Emphasis added.]

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[10] *State* v. *Surety Finance Co.*, 42 Ariz. 42; *Ross* v. *Rich*, 210 Ark. 74; *Wilson* v. *Waters*, 19 Cal. 2d 111; *Batesville Casket Co.* v. *Fields*, 288 Ky. 104; *Franke* v. *Allen*, 199 Minn. 450; *Department of Banking* v. *Foe*, 136 Neb. 422; *Stockhard* v. *Hamilton*, 25 N.M. 240; *Rickey* v. *Slingerland*, 143 Misc. 583 (N.Y.); *Tribune Reporter Printing Co.* v. *Homer*, 51 Utah 153; *Knight* v. *People's National Bank*, 182 Va. 380; *Chadek* v. *Forest County*, 206 Wisc. 85.

Section 6332 was added to the internal revenue laws by the Revenue Act of 1926 for the express purpose of preventing the defeat of the lien of Section 6321 and the levy of Section 6331 by any person in possession of leviable property of a taxpayer.[11] It is therefore a strengthening provision, extending the ancient remedies of levy and distraint. *United States* v. *Manufacturers Trust Co.*, 198 F. 2d 366, 369 (C.A. 2). The only reported case involving the application of this provision, or its predecessor, to the states is *United States* v. *City of New York*, 82 F. 2d 242 (C.A. 2), referred to above at page 15. In that case there was an attempt to hold the city liable for property in the custody of the police property clerk which was owned by a person arrested by the police. Demand was made that it be surrendered to the United States to satisfy delinquent taxes of the person under arrest. Instead the property clerk returned it to its owner

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[11] Section 6332 was added by Section 1114(e) of the Revenue Act of 1926 (c. 27, 44 Stat. 117), as to which the Senate Committee Report (S. Rep. No. 52, 69th Cong., 1st Sess., p. 38 (1939-1 Cum. Bull. (Part 2), p. 360), stated as follows:

DISTRAINT ON PROPERTY NOT IN POSSESSION OF TAXPAYER

Section 1114(e): The existing law permits distraint upon personal property of a delinquent taxpayer even though in possession of another person. The committee amendment specifically makes it the duty of the possessor to surrender the property upon which a levy is made, and imposes upon him, in addition to any criminal liability, a civil liability, if he fails to do so, equal to the value of the property, but not exceeding the amount of tax, a liability similar to that of an executor who pays debts before he pays a debt due the United States.

and the United States sued the city. The Court of Appeals for the Second Circuit held that, if the property had been in the possession of the city, it would have been liable. However, it found for New York on the ground that the property clerk held the property not for the city but as agent of the criminal courts. Insofar as the case is pertinent here it supports the government's claim.

The petitioner asserts, however, that Section 6332(a) of the Internal Revenue Code does not apply because the state is not a "person." The main argument in support of this position is that the failure of Congress expressly to include the states in the statute must be taken as an indication of an intent to exclude them.[12] From the citation of *United States* v. *Cooper Corporation,* 312 U.S. 600, and *McBride* v. *Board of Commissioners,* 44 Fed. 17 (C.C. D. Wash.), it appears that the petitioner has confused the issue of whether a federal law applies to a state with the entirely different proposition that a sovereign is not comprehended within its own statutes unless specifically mentioned. Both cases cited are of the latter

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[12] The definition of "person" in Section 6332(c) *supra*, p. 4, is not an attempt to list entities which should be considered persons; its obvious purpose is to define the responsibility of persons acting in a representative capacity, an issue discussed in Point II of this brief. The general definition of "person" for the purpose of the Code is found in Section 7701(a)(1) which reads: "The term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." Subsection (b) of Section 7701 provides: "The terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined."

type. Contrary to the view expressed by the petitioner, it is a well-settled principle that a State, state agency or state officer or employee is included in the general terms of a federal statute, and particularly under the word "person", unless a contrary intent is indicated. See, e.g., *Wilmette Park Dist.* v. *Campbell*, 338 U.S. 411; *New York* v. *United States*, 326 U.S. 572; *Georgia* v. *Evans*, 316 U.S. 159; *Helvering* v. *Gerhardt*, 304 U.S. 405; *Ohio* v. *Helvering*, 292 U.S. 360; *South Carolina* v. *United States*, 199 U.S. 437; *Welsh* v. *United States*, 220 F. 2d 200 (C.A. D.C.); *California* v. *United States*, 195 F. 2d 530 (C.A. 9), certiorari denied, 344 U.S. 831 (affirming *per curiam*, *United States* v. *Graham*, 96 F. Supp. 318 (S.D. Cal.)); *United States* v. *First Capital Nat. Bank*, 89 F. 2d 116 (C.A. 8); *United States* v. *City of New York*, 82 F. 2d 242 (C.A. 2); *United States* v. *Newhard*, 128 F. *Supp.* 805 (W.D. Pa.); *Farley* v. *Manning*, 4 N.J. 571.

No contrary intent exists or is to be presumed as to statutes relating to the imposition and collection of federal taxes, and that is true even though the word "person" is defined to include a partnership or a corporation and does not mention states, state agencies or state officers. In *South Carolina* v. *United States*, 199 U.S. 437, where it was held that a tax on "every person" who sells liquor applied to state liquor stores, the Court stated (pp. 447–448):

> * * * It is true a further question is made whether the act of Congress is broad enough to include such persons. But upon this we have little doubt. Section 3232 Rev. Stat. provides: "No person shall be engaged in nor carry on

any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided."

Section 3244 contains these words of description:

"Every person who sells, or offers for sale foreign or domestic distilled spirits or wines, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors."

"Person" is also defined:

"SEC. 3140. * * * Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person', as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person."

Now, the dispensers were persons who sold liquors. They applied for and received the licenses. True they were acting simply as agents of the State, but if the fact that the State was the principal creates no exemption from Federal taxation then the statute reaches them because they were the actual sellers.

In *Ohio* v. *Helvering,* 292 U.S. 360, 370–371, involving a later claim of exemption under the same statute, the Court reaffirmed its decision in the *South Carolina* case but extended the definition of "person" to include the State itself. See also, *California* v. *Taylor,* 353 U.S. 553, 562–563. This rule was later followed and held to apply to a state as a "person" collecting admissions taxes (*Allen* v. *Regents,* 304 U.S. 439, rehearing denied, 304 U.S. 590), selling soft

drinks (*New York* v. *United States,* 326 U.S. 572, 586), and again in collecting admissions taxes (*Wilmette Park Dist.* v. *Campbell,* 338 U.S. 411, 416). Except for the tax on soft drinks involved in the *New York* case, the taxes on admissions and beverages involved in those decisions are still in force as sections of the 1954 Code (Sections 4231, 5122(a)) and still depend upon the meaning of the word "person" for their application to state and local agencies. Similarly, although the definition of "gross income" contained in Section 22(a) of the Revenue Act of 1932 (c. 209, 47 Stat. 169) made no reference to the salaries of State employees, their salaries were nevertheless held subject to the federal income tax in *Helvering* v. *Gerhardt,* 304 U.S. 405. And see *Graves* v. *N.Y. ex rel. O'Keefe,* 306 U.S. 466. Indeed, the pertinent legislative history [13] shows that Congress deliberately omitted any specific reference to the salaries of State officers and employees because it believed

[13] The language of the 1932 Act originated in Section 213 (a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, which has the following history. The Civil War Income Tax Acts construed in *The Collector* v. *Day,* 11 Wall. 113, referred only to "income of every person residing in the United States, * * * whether derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment or vocation, carried on in the United States or elsewhere, or from any other source whatever" (p. 113). The first three Revenue Acts after the Sixteenth Amendment, specifically exempted from federal taxation the compensation of all officers or employees of a state or political subdivision thereof. Income Tax Act of 1913, c. 16, Sec. II(B), 38 Stat. 114, 168; Revenue Act of 1916, c. 463, Sec. 4, 39 Stat. 756, 759; Revenue Act of 1917, c. 63, 40 Stat. 300. The exemption was dropped, never to be re-

they were included within the general definition of gross income long before this Court so decided. Later, in confirmation of the *Gerhardt* and *Graves* decisions, *supra,* Congress in the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574, amended the statutory definition of gross income in Section 22(a) of the 1939 Code to include "compensation for personal service as an officer or employee of a state or any political subdivison". But this express reference was eliminated from the equivalent Section 61(a) of the 1954 Code as unnecessary (S. Rep. No. 1622, 83d Cong., 2d Sess., 168, U.S.C. Cong. & Adm. News (1954) 4802), thus providing fresh evidence that Congress intends state personnel to be included under the general terms of revenue acts. In short, the rule is not that asserted by petitioner—that a state is included in the term "person" only in special cases (Br. 14); it is the direct opposite so far as revenue measures are concerned—that, to effect uniform application, state officers and employees and even a state itself are included in general terms, such as the word "person", unless they are expressly exempted.

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stored, in Revenue Act of 1918, c. 18, 50 Stat. 1057, the House Ways and Means Committee stating that "in all equity and justice such officials should be subject to income taxes and that, if necessary, this matter should be definitely decided by the courts." H. Rep. No. 767, 65th Cong., 2d Sess. (1918) 9 (1939-1 Cum. Bull. (Part 2) 86, 92. See Powers of Congress to Tax the Interest From State and Local Securities and the Compensation of State and Local Employees, Report to the Joint Committee on Internal Revenue Taxation (1939), p. 38.

The petitioner's reliance upon Section 3401(c) (Br. 11–12) is misplaced. That Section of the Code [14] deals with the withholding of taxes from wages of specified classes of employees, and subsection (*c*) expressly includes wages of officers and employees of the United States and of the states. This express inclusion arises out of the special context of Section 3401. The collection of taxes by withholding from wages was a novel device originated by the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126. The withholding provisions were added at that time as a subchapter to Chapter 9—Employment Taxes of the 1939 Code—since these latter taxes already established the mechanism of withholding as a payroll deduction by the employer. The social security employment taxes, however, expressly exempted federal and state officers and employees (1939 Code Section 1607(c)(6) and (7)), since they were exempt from the original social secu-

[14] See the following:

SUBTITLE C—EMPLOYMENT TAXES

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CHAPTER 24—COLLECTION OF INCOME TAX AT SOURCE ON WAGES

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SEC. 3401. DEFINITIONS.

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(c) *Employee.—For purposes of this chapter*, the term "employee" includes an officer, employee, or elected official of the United States, a State, Territory, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term "employee" also includes an officer of a corporation. [Italics supplied.]

(26 U.S.C., Supp V, 3401.)

rity act programs of old age and unemployment insurance benefits. In adapting these provisions to income tax withholding, it was necessary to expressly include both groups, since both were subject to federal income taxation. No such special problem was presented by Section 6332: as we have seen, it simply strengthened by like general terms the all-inclusive language of lien and levy dating from 1866.[15]

Since the structure and purpose of Section 6332 of the Code is such that a state should be considered a "person" in the same way as any other entity and since in most situations a state is considered a "person" under the tax laws of the United States, West Virginia should be considered as within the scope of the statute.

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[15] There is another statutory reference to salaries of state employees worth noting: the special provision of Section 1211 of the Revenue Act of 1926, *supra*, which provided that:

> Any taxes imposed by the Revenue Act of 1924 or prior revenue Acts upon any individual in respect of amounts received by him as compensation for personal services as an officer or employee of any State or political subdivision thereof (except to the extent that such compensation is paid by the United States Government directly or indirectly), shall, subject to the statutory period of limitations properly applicable thereto, be abated, credited, or refunded.

But this is an express provision of *exemption* from tax, of historical importance only, which was placed in the law to relieve employees of municipal waterworks, lighting plants, and similar activities who were held to be non-governmental employees outside the then prevailing immunity, by Treasury regulations, before *Brush* v. *Commissioner*, 300 U.S. 352. See Report to the Joint Committee on Internal Revenue Taxation, *op. cit.*, *supra*, note 13, p. 38.

C. THERE IS NO BURDEN ON THE STATE AND THEREFORE NO CONSTITUTIONAL IMMUNITY OR PROHIBITION AGAINST LEVYING UPON STATE EMPLOYEES' SALARIES

As the court below stated (R. 35), there is no Constitutional requirement that the salaries of state employees be treated differently from the salaries of others. Viewed as income, the salaries of state officers and employees are subject to federal taxation, no impairment of state sovereignty being involved. *Helvering* v. *Gerhardt,* 304 U.S. 405; *Graves* v. *N.Y. ex rel. O'Keefe,* 306 U.S. 466. Thus, public officers and employees are to be treated the same as all other citizens in respect of bearing their share of the financial burdens of government.[16] In the present context the salaries of state employees are viewed as property or property rights and the question is whether they are subject to levy for unpaid federal taxes. But the same considerations which authorize federal taxation of such salaries authorize the collection of unpaid taxes from such salaries. A tax that cannot be collected is no tax at all (*United States* v. *Snyder,* 149 U.S. 210), the imposition and collection of a tax being inseparable under the Constitutional power of Congress "to lay and collect Taxes" (Art. I, Sec. 8, Appendix A, *infra, p.* 41). The statutory procedures of lien and levy are essential measures of tax collection. *Michigan* v. *United States,* 317 U.S. 338. Since there

[16] There are now a total of 5,608,000 state and local government officers and employees in the United States. Department of Commerce, Bureau of the Census, *Summary of Public Employment*, Vol. II, No. 1 (1957 Census of Governments) p. 13. This includes executive officers, legislators, and judges as well as employees (p. 3).

is no Constitutional immunity against the taxation of salaries of state employees, there is likewise no Constitutional immunity, so far as the individual taxpayer is concerned, against collection of unpaid taxes out of salaries paid by a state. Indeed, even specific state exemptions from levy are ineffective for federal tax purposes. *Fried* v. *New York Life Insurance Co.*, 241 F. 2d 504 (C.A. 2), certiorari denied, 354 U.S. 922; *Shambaugh* v. *Scofield*, 132 F. 2d 345 (C.A. 5); *Jones* v. *Kemp*, 144 F. 2d 478 (C.A. 10).

Nor do levies upon the salaries of state employees impose any unconstitutional burden on the states or on state officials. A federal tax may even be laid upon the state itself in respect of any activity which is not an essential governmental function. *Allen* v. *Regents*, 304 U.S. 439; *Wilmette Park Dist.* v. *Campbell*, 338 U.S. 411. As to levies upon the salaries of state employees, state officials are "merely collectors" of a tax laid on private persons and no burden at all on the state is involved. See concurring opinion of Justices Reed, Stone, and Black in *Allen* v. *Regents*, *supra*, p. 456. It would be strange indeed if the federal government were denied its paramount right to collect taxes through levy upon the salaries of state employees when, as already noted (*supra*, pp. 19–21), 32 states allow private creditors to garnishee the salaries of public employees. As far as the state is concerned, a levy upon the state paymaster simply directs him to pay the accrued salary of the delinquent taxpayer over to the United States in satisfaction of the employee's unpaid taxes. The money belongs to the employee, it is his property, and the

only interest of the state is that it shall be paid over to the employee or to his account in such a way that the liability of the state to pay compensation for services rendered is discharged by payment. *Ross* v. *Rich*, 210 Ark. 74. This interest is fully satisfied by compliance with the tax levy, for it is clearly settled that "payment to the government pursuant to the levy and notice is a complete defense to the debtor against any action brought against him on account of the debt." *Bank of Nevada* v. *United States*, 251 F. 2d 820, 828 (C.A. 9), certiorari denied, 356 U.S. 938; *United States* v. *Eiland*, 223 F. 2d 118, 122 (C.A. 4).

II

THE PETITIONER WAS PERSONALLY LIABLE FOR DISREGARDING THE DEMAND TO SURRENDER THE FUNDS TO THE UNITED STATES

A. SECTION 6332 OF THE INTERNAL REVENUE CODE APPLIES TO THE PETITIONER AND IMPOSES PERSONAL LIABILITY FOR HIS REFUSAL TO HONOR THE DEMANDS SERVED ON HIM

The petitioner, who was the state auditor of West Virginia, does not deny that if any state official could be required to turn over the accrued salary of the state employees to the Internal Revenue Service, he was that official. As auditor it was his duty to issue warrants on the state treasury authorizing the payment of money. *Board* v. *Sims*, 136 W. Va. 789;

Board of Governors v. *Sims*, 140 W. Va. 64.[17] Moreover, it is not denied that he was personally served with the demand to surrender, that he had full knowledge of the claims of the United States, and that the statutory provision imposing personal liability for disregarding the demand was included in the notices (*supra*, pp. 6–7). The question narrows down, therefore, to whether a person responsible for making payments from a state's treasury who disregards a demand to surrender accrued salaries to satisfy delinquent taxes is personally liable.

In the first place, it is clear that under the structure of Section 6332 there is a Congressional intention to impose personal liability on an agent who refuses to respect a demand served upon him. Thus Section 6332(b), *supra*, p. 3, provides that a person refusing to comply "shall be liable in his own person and

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[17] 1 West Virginia Code of 1955, § 1019 provides:

Every person claiming to receive money from the treasury of the State shall apply to the auditor for a warrant for same. The auditor shall thereupon examine the claim, and the vouchers, certificates and evidence, if any, offered in support thereof, and for so much thereof as he shall find to be justly due from the State, if payment thereof be authorized by law, and if there be an appropriation not exhausted or expired out of which it is properly payable, he shall issue his warrant on the treasurer, specifying to whom and on what account the money mentioned therein is to be paid, and to what appropriation the same is to be charged. * * *

estate." And, while Section 6332(c), *supra*, p. 4, in defining "person", deals with persons acting for corporations or partnerships specifically, it clearly embodies the theory that the natural person who performs the act involved is to be held liable.[18] The fact that this subsection specifically refers only to corporations and partnerships cannot be construed to negative liability on the part of an agent of a state. Cf. *Ohio* v. *Helvering*, 292 U.S. 360, 370–371.

There is no merit in petitioner's argument that Section 6332 should be strictly construed, and thus as excluding a state officer, because the statute is penal in nature. Actually, although subsection (b) is entitled "Penalty for Violation", the liability imposed is not a penalty in any criminal sense. It is a simple liability for and in the amount of the conversion of another's property, akin to the established liability of a garnishee who, after due notice, lets the garnished property escape the creditor's right to it. *Brashear* v. *West*, 7 Pet. 608, 618. It is a civil liability only. S. Rep. No. 52, 69th Cong., 1st Sess., p. 38, *supra*, p. 22, n. 11; Cf. *Helvering* v. *Mitchell*, 303 U.S. 391. Since the statute is comprehensive and in terms provides no exemption from that civil liability, no exemption therefrom can be implied as a matter of construction.

The petitioner asserts that whatever the legal liability of an agent of a private corporation may be, he

[18] In the case of a state, the imposition of liability on the agent may be necessary in order to obtain any recovery since the principal might often be able to escape liability on the ground that it had not given its agent authority to contravene federal law. Cf. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 686–688, rehearing denied, 338 U.S. 840.

may not, as a state officer, be held personally liable for performing his official duty (Br. 24–28). In making this argument, the petitioner relies primarily on *Cooper* v. *O'Connor*, 99 F. 2d 135 (C.A. D.C.) certiorari denied, 305 U.S. 643, rehearings denied, 305 U.S. 673, 307 U.S. 651, which upholds the freedom of a public official from liability to individuals for exercising discretion vested in him by law. That very case recognizes that officials may be liable for failing to carry out duties when the discretionary element is lacking. 99 F. 2d 135, 137. And the petitioner himself does not argue that Congress may not impose personal liability on a state official for impeding the collection of federal taxes (Br. 27).

Contrary to the assumption of the petitioner, it has been held that a state officer, employee or agent is to be held accountable individually for the collection or payment of a federal tax. *South Carolina* v. *United States*, 199 U.S. 437; *Allen* v. *Regents*, 304 U.S. 439. Even with respect to criminal liability, it has been held that a state officer cannot escape on the ground that he was performing his official duty. *Clendennin* v. *United States*, 265 Fed. 412 (C.A. 4). There the conviction of a state prohibition officer for carrying on the business of a retail liquor dealer without having paid the federal tax was affirmed, the court stating at 413:

> He could not escape the penalty of the federal law on the ground that his intention in the transaction was to promote the enforcement of the state laws. Even if he had acted under express official authority from the state of West

> Virginia, he could not deal in liquor, directly or indirectly, either alone or in conjunction with Nutter, without paying the special tax required by the federal statute. * * *

The statute, as applied to petitioner, is of course coercive in the sense that it makes him personally liable for the amount of taxes which he prevented the Government from collecting. But such a liability is a necessary incident to the federal power to collect taxes, as to state officers no less than others. And it is the very fact that revenue laws should be given uniform application that justifies the rule that state officers are not to be impliedly excluded from the operation of a statute which uses language sufficiently comprehensive to include them. To contend, as the petitioner does, that the federal government has not imposed an obligation upon him to aid in the collection of taxes, and personal liability for a refusal to fulfill that obligation, is to assert that, without any indication of or reason for doing so, Congress has by implication restricted its power to collect taxes from state employees. Here, no less than in other contexts, there is no reason to exempt a state or state official "from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States* v. *California*, 297 U.S. 175, 186; *California* v. *Taylor*, 353 U.S. 553, 562–563.

B. NO PROBLEM OF FEDERAL-STATE RELATIONS IS INVOLVED IN THE IMPOSITION OF PERSONAL LIABILITY ON THE PETITIONER FOR HIS REFUSAL TO HONOR THE LEVIES

Some of petitioner's arguments imply that the application of Section 6332 poses a problem in federal-state relations. One such argument is that, if he heeded the notices of lien and levy, he risked violation of state law governing his disbursement of state funds, which do not provide for federal liens and levy (Br. 22–23). But that argument is without substance. The silence of the state laws does not suggest any repugnance to or conflict with federal statutes, since the collection of federal taxes is not the states' responsibility; the authority for the federal lien and levy lies wholly in the federal statutes. *United States* v. *Acri*, 348 U.S. 211; *United States* v. *Knott*, 298 U.S. 544.

The petitioner complains that he, in good faith and on legal advice and believing that he was bound by state law to do so, paid the accrued salaries to the delinquent taxpayer-employees and now finds himself subject to personal liability for violation of a federal statute as a result of his action in discharge of his official duties under state law (Br. 25–27). But the facts show there is no excuse for his present situation. He was given express notice that the United States had a lien on the accrued salaries of the delinquent employees, that the accrued salaries constituted property belonging to the United States, that the United States claimed possession of the accrued salaries and

demanded their surrender. In addition, he was specifically notified that if he failed to surrender the accrued salaries he would be held personally liable, as provided by statute. He nevertheless deliberately assumed the risk of personal liability when he chose to ignore the notices and paid out the salaries to the employees. The excuse that his wrongful action was taken in good faith, in reliance upon legal advice, cannot be accepted. In the first place, even under West Virginia law, he is not relieved from personal liability for action as a state officer merely because he acted on legal advice. See *Matthews* v. *Anderson,* 127 W. Va. 147, 152. Secondly, petitioner needlessly violated the federal law. The state law did not compel him to pay out the salaries and, if he had doubts as to the proper course, as he says (Br. 25), he could have held the warrants and awaited a judicial determination of the allegedly conflicting claims of the United States and of the employees. He would have been at that point "a mere stakeholder." *Railroad Co.* v. *Rogers,* 52 W. Va. 450, 466. Had he taken that course, his personal liability would have been a technical one only, to make certain that the salaries were not paid out in defeat of the lien and levy. Thus, his present personal liability does not arise out of the performance of his official duties, but out of his knowing disregard of a federal statute essential to the collection of federal taxes. It is an old rule that the disobedience of a statutory duty "is always at the peril of the party disobeying, whether a private individual, or a public officer or a board of public officers." *Clark* v. *Miller,* 54 N.Y. 528. See *Board of Governors* v. *Sims,* 140 W. Va. 64, 77.

The petitioner's complaint in this connection is reduced to the fact that he has incurred personal liability for action which he says he took on advice of the Attorney General of the state. Whether his wrongful act was his own or should be attributed to the state has a bearing on a feature of the case which is strictly personal between petitioner and the state—whether he will or should receive reimbursement from the state for payment of the liability he incurred in refusing to honor the federal levies. That is not a question to be decided by this Court, but we note that it may be possible for the state to reimburse petitioner. It has been held lawful for a state to "indemnify their officers against liability which they may incur in the *bona fide* discharge of their duties * * * even though the result may show that the officers exceeded their legal authority." Mechem, *Public Offices and Officers* (1890) Sec. 879.

As we have already shown (*supra,* pp. 30–32), there is no Constitutional immunity or other prohibition against a federal levy upon the accrued salaries of State employees. No unconstitutional burden is placed on a State by requiring it, like any other employer, to aid in the collection of federal taxes by honoring levies on the accrued salaries of employees. Indeed, when under State law the salary of an employee has accrued and become payable (the stipulated fact here) it becomes the property of the taxpayer and the state paymaster has no interest therein except the ministerial duty of seeing that it is paid to the employee or to his account. ***Board of Governors*** **v.** ***Sims,*** **140 W. Va. 64.**

CONCLUSION

The decision below is correct and should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

MELVA M. GRANEY,
JOSEPH KOVNER,
Attorneys.

JANUARY 1959.

APPENDIX A

Constitution of the United States:

ARTICLE I

* * * * *

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * * * *

ARTICLE VI

* * * * *

Clause 2. This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

Internal Revenue Code of 1954:

SEC. 6334. PROPERTY EXEMPT FROM LEVY.

(a) *Enumeration.*—There shall be exempt from levy—

(1) *Wearing Apparel and School Books.*—Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) *Fuel, Provisions, Furniture, and Personal Effects.*—If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $500 in value;

(3) *Books and Tools of a Trade, Business, or Profession.*—So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $250 in value.

* * * * *

(c) *No Other Property Exempt.*—Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

(26 U. S. C., Supp. V, 6334.)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) *Parties.*—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) *Adjudication and Decree.*—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

* * * * *

(26 U.S.C., Supp. V, 7403.)

Treasury Regulations Relating to Assessment, Collection, Abatement, Credit, and Refund of Taxes (1954):

Sec. 301.6331–1. Levy and Distraint—(a) Authority to levy—* * *

* * * * *

(4) Certain types of compensation—* * *

(ii) State and municipal employees.—Accrued salaries, wages, or other compensation of any officer, employee, or elected or appointed official of a State or Territory, or of any agency, instrumentality, or political subdivision thereof, are also subject to levy to enforce collection of any Federal tax.

* * * * *

APPENDIX B

Form 668-C (REV. JAN. 1968)	U. S. TREASURY DEPARTMENT · INTERNAL REVENUE SERVICE **FINAL DEMAND**
DISTRICT	DATE

TO:

On _____, 19__, there was served upon you a levy, by leaving with _____ at _____ a notice of levy, on all property, rights to property, moneys, credits and bank deposits then in your possession, to the credit of, belonging to, or owned by _____ of _____, who was at the time, and still is, indebted to the United States of America for unpaid internal revenue taxes, together with statutory additions which had accrued thereon at the time of levy, and which amounted at that time to the sum of $_____. Demand was made upon you for the amount set forth in the notice of levy, or for such lesser sum as you may have been indebted to the taxpayer, which demand has not been met.

Your attention is invited to the provisions of Section 6332, Internal Revenue Code of 1954, as follows:

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty For Violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) Person Defined.—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

Demand is again made for the amount set forth in the notice of levy, $_____, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served. If you comply with this final demand within five days from its service, no action will be taken to enforce the provisions of section 6332 of the Internal Revenue Code. If, however, this demand is not complied with within five days from the date of its service, it will be deemed to be finally refused by you and proceedings may be instituted by the United States as au-

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty For Violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) Person Defined.—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

Demand is again made for the amount set forth in the notice of levy, $_____, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served. If you comply with this final demand within five days from its service, no action will be taken to enforce the provisions of section 6332 of the Internal Revenue Code. If, however, this demand is not complied with within five days from the date of its service, it will be deemed to be finally refused by you and proceedings may be instituted by the United States as authorized by the statute quoted above.

DISTRICT DIRECTOR OF INTERNAL REVENUE	BY *(Signature)*	TITLE

CERTIFICATE OF SERVICE

I hereby certify that this Final Demand was served by handing a copy thereof to:

NAME	TITLE	
PLACE	DATE	TIME
COLLECTION OFFICER *(Signature)*		DATE

U. S. GOVERNMENT PRINTING OFFICE: 1959